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Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity

ANTHONY V. ALFIERI*

INTRODUCTION

This Article explores new research directions in the study of large law firm risk governance norms and practices. The purpose of this ongoing study is to assess the impact of governance norms and practices on individual and institutional decision-making under contemporary models of large law firm economics in the fields of litigation, deal transactions, and workplace employment, including hiring, promotion, and retention.¹ The nationwide economic downturn that frames this inquiry weighs heavily on traditional models of large law firm economics. Historically significant, the downturn exacerbated structural tensions and ratcheted up institutional pressures on partners,² associates,³ and the workplace as a whole.⁴ Experienced on both local and global scales, these

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1. I use the term "risk governance" instead of the more conventional "risk management" to convey a deeper, more intrinsic normative purpose and value, rather than a narrowly instrumental, utilitarian function.

2. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 1-17 (2010); Leigh Jones, *Vanishing Act: Year II*, NAT'L L.J., Nov. 8, 2010, at 54 (describing 2009–2010 declines in partner and associate ranks of the nation's 250 largest law firms as "the biggest two-year decline in the 33-year history of the [NLJ] survey").

3. See Vanessa O'Connell & Nathan Koppel, *Law Firms Hold Line in Setting Bonuses*, WALL ST. J., Dec. 27, 2010, at B1.

4. See Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 (2010); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2070-72 (2010); HILDEBRANDT BAKER ROBBINS & CITI PRIVATE BANK, *THE 2011 CLIENT ADVISORY* 2-5 (2011), available at <http://hildebrandt.staged.hubbardone.com/Hubbard.webParts/Core/abc.aspx?url=http%3A//hildebrandt.staged.hubbardone.com/2011ClientAdvisory>; HILDEBRANDT BAKER ROBBINS & CITI PRIVATE BANK, *THE 2010 CLIENT ADVISORY* 2 (2010), available at http://www.hbrconsulting.com/Hubbard.FileSystem/files/Publication/bf6e65c1-b11e-42b2-811c-05e7d728e9c7/Presentation/PublicationAttachment/1f0c1222-7572-4bfd-aea4-08601bd6e66d/2010_Client_Advisory.pdf.

tensions and pressures shape the day-to-day judgments of lawyers in corporate boardrooms, federal and state courtrooms, and law firm suites. Together, they mold risk-averse and risk-taking behavior in the lawyering process and in law firm management.

In a prior work, I argued that the widespread adoption of risk management mechanisms—compliance procedures, internal controls, and reporting requirements—by law firms diminished a full appreciation of the difficult moral choices faced by lawyers in modern practice throughout litigation and transactional fields of representation. Albeit functionally useful, these organizational mechanisms, I argued, diluted the deep-rooted, other-regarding obligations of lawyers in society across public and private spheres of service.⁵ Drawing on the work of legal ethics scholars Milton Regan and William Simon,⁶ I maintained that the technology of risk assessment and regulation gleaned from the adjacent professional arenas of commerce, insurance, and corporate industry discounted the daily need for the exercise of moral discretion and the daily calling of a higher public obligation.⁷ As a result, I asserted, lawyers and law firms together underestimated the burdens of individual moral agency in the requisite discretionary decisions that are part and parcel of everyday legal advocacy.⁸ No less important, I added, the same lawyers and law firms routinely neglected their well-settled individual and collective duties of social responsibility to clients, third parties, and the public, and thus discarded the highest ambitions of professionalism in American law.⁹ Prominent among those ambitions are the responsibilities to ensure equal opportunity, diversity, and equity in the workplace.¹⁰

In revisiting my previous inquiry, this Article seeks not only to integrate the ideas of diversity and risk governance in law firm employment and workplace inclusion and exclusion, but also to test the “moral diminution” thesis sketched above against a competing “collaborative” thesis put forward by the respected

5. See Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910 (2006) [hereinafter Alfieri, *The Fall of Legal Ethics*].

6. See MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) [hereinafter SIMON, *THE PRACTICE OF JUSTICE*].

7. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1910–11.

8. *Id.* at 1911; see also Stephan Landsman, *The Risk of Risk Management*, 78 FORDHAM L. REV. 2315, 2326–27 (2010) (predicting a risk management-fueled law firm “retreat to simplistic self-protective solutions” that is both “misleading and dangerous”).

9. Landsman, *supra* note 8, at 2326–27. Historically, the highest ambitions of professionalism in American law and ethics typically comport with traditions of independence, service, and trust. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert Granfield & Lynn Mather, *Pro Bono, the Public Good, and the Legal Profession*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 1–19 (Robert Granfield & Lynn Mather eds., 2009).

10. See Deborah Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011) [hereinafter Rhode, *Diversity and Gender Equity in Law Firms*].

practitioner and law firm consultant Anthony Davis.¹¹ Contrary to my initial hypothesis that risk management detrimentally conflates professional ethics and identity with economic self-interest, Davis insists that risk management beneficially educates lawyers in ethics, enhances their decision-making, and elevates their individual behavior through institutional culture and oversight.¹² To evaluate Davis's risk management thesis and to extend its reach to law firm employment and workplace governance more generally, the instant Article revisits the case of John Gellene, a former partner at the Wall Street law firm of Milbank, Tweed, Hadley & McCloy (Milbank), prosecuted for transactional and litigation misconduct in *United States v. Gellene*,¹³ and also examines the recent high profile employment discrimination suit in *Equal Employment Opportunity Commission v. Kelley Drye & Warren, LLP*,¹⁴ and the widely reported and protracted discovery sanction controversy in *Qualcomm Inc. v. Broadcom Corp.*¹⁵ Each of these cases illustrates the individual and institutional exercise of risk governance norms and practices in discrete litigation, transactional, and employment settings. Applied in the context of the large law firm legal services industry, this multi-pronged inquiry will help chart new directions for risk governance research on the legal profession.

New directions in law firm organizational ethics research include studies of both "commercialism" and "managerialism."¹⁶ This Article mainly addresses the disquieting rise of risk-calibrated managerialism among law firms, here marked by "their tendency to fragment legal work into specialist and technical areas, and to create hierarchical arrangements" that "can degrade individual lawyers' sense of professional autonomy and their capacity to take responsibility for their own work."¹⁷ That growing degradation signals an industry-wide failure to integrate institutional risk management systems and the broader ethical traditions of the profession in everyday practice. Daily evidence of such failed integration in litigation, transactional, and workplace contexts demonstrates not only that "risk prevention only gets you so far,"¹⁸ but also that risk prevention may diminish the exercise of professional autonomy and responsibility.

11. See Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 96 (2008) [hereinafter Davis, *Legal Ethics and Risk Management*].

12. See *id.* at 113-24.

13. *United States v. Gellene*, 24 F. Supp. 2d 922 (E.D. Wis. 1998).

14. *EEOC v. Kelley Drye & Warren, LLP*, No. 10 Civ. 0655 (LTS), 2011 WL 280804 (S.D.N.Y. Jan. 20, 2011).

15. *Qualcomm Inc. v. Broadcom Corp. (Qualcomm III)*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

16. See Christine Parker & Lyn Aitken, *The Queensland "Workplace Culture Check": Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399, 402-03 (2011).

17. *Id.* at 403 ("Managerialism can 'deprofessionalize' legal work and colonize the space in which lawyers might otherwise have been trusted to act in contextually appropriate ways using professional judgment and values.").

18. E-mail from Deborah Rhode to author (May 2, 2011, 7:22 PST) (on file with author).

Consider Davis's vision of ethics and professionalism in this troubling light. Driven by the profit and productivity imperatives of law firm economic self-interest, Davis's management axioms and norms offer a vision of lawyer professionalism limited in moral aspiration and narrow in social function. At best, his espoused norms promote technical rule calibrations to minimize risk-taking behavior harmful to lawyer or law firm prosperity. Davis defines harm expressly in terms of adverse impact on institutional profitability, fastening risk incentives to individual and collective self-interest.¹⁹ His prescribed environment of centralized authority and leadership supplies an efficient, albeit overly segmented and structured, mechanism to foster self-interested compliance, a mechanism that effectively undermines independent ethical protest and resolve.²⁰ Resolution of ethical issues in this environment too often hinges on judgments of individual and firm advantage framed by the tournament, "eat what you kill" culture of the large law firm legal services industry. Such self-regarding judgments consider the *reactions* instead of the *interests* of law, integrity, or community.

Despite these deficiencies, risk management systems serve a useful risk-checking and compliance-reinforcing function in the governance of large, bureaucratic institutions. While necessary, the systems are not sufficient for ethical governance in transactional representation and negotiation, litigation advocacy, or workplace employment. Adequate governance requires regulatory systems that cultivate a lawyer's independent moral judgment and individual social responsibility, celebrate classical values of law and diverse community, and pronounce higher aspirations of professional and public leadership.²¹ Standing alone, ethics rules furnish formal, procedural methodologies tailored to private client and professional lawyer interests but afford little substantive guidance for lawyer moral discretion in the pursuit of legality and justice in litigation, transactions, or workplace equity. Deeper integration of the moral and public precepts of the profession into the prescribed risk-based routines of expanding industry-wide managerial systems returns to lawyers and law firms the important opportunity to fulfill the obligations of moral agency, to discharge the duties of social responsibility, and to meet the higher ambitions of professional independence, service, and trust.

The Article proceeds in four parts. Part I explores the nature and regulation of risk in law firm management and corporate governance. Part II examines Davis's attempted integration of risk management precepts and legal ethics rules in light of David Luban's recent work on risk deniability and integrity in the legal

19. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 99–100.

20. *See id.* at 100.

21. *See Alfieri, The Fall of Legal Ethics*, *supra* note 5, at 1949–51.

profession.²² Part III extends Luban's notion of risk deniability to the context of the *Gellene*, *Kelley Drye*, and *Qualcomm* case studies, parsing out the concepts of discrimination, transactional, and litigation risk in law firm practice. Part IV deduces an alternative set of risk governance ethics from classical, discretionary, regulatory, and diversity norms of the profession in an effort to enhance lawyer integrity and to expand equal opportunity and equitable treatment in the large firm legal services industry. Turn first to the literature of risk management and governance in the legal services industry.

I. RISK IN LAW FIRM MANAGEMENT AND GOVERNANCE

The literature of risk,²³ risk management,²⁴ and risk governance²⁵ is wide ranging, encompassing finance,²⁶ the airline and hospital industries,²⁷ insurance,²⁸ science,²⁹ and more. In law and related socio-legal studies,³⁰ the literature addresses corporate governance,³¹ criminal justice,³² arbitration and litigation

22. See generally DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007); Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1689–99 (2009) [hereinafter Alfieri, *Jim Crow Ethics*].

23. See JOHN ADAMS, *RISK* (1995); JAKOB ARNOLDI, *RISK* (2009); ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (1992); ULRICH BECK, *WORLD RISK SOCIETY* (1999); Tom Baker & Jonathan Simon, *Embracing Risk*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 1–25 (2002) [hereinafter *EMBRACING RISK*]; Ulrich Beck, *World at Risk: The New Task of Critical Theory*, 37 DEV. & SOC'Y 1 (2008).

24. See generally ANTHONY E. DAVIS & PETER R. JARVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* (2d ed. 2007); Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677 (1994).

25. See ORTWIN RENN, *RISK GOVERNANCE: COPING WITH UNCERTAINTY IN A COMPLEX WORLD* 8–11 (2008).

26. See JAMES T. GLEASON, *RISK: THE NEW MANAGEMENT IMPERATIVE IN FINANCE* (2000); Douglas O. Edwards, *An Unfortunate "Tail": Reconsidering Risk Management Incentives After the Financial Crisis of 2007–2009*, 81 U. COLO. L. REV. 247 (2010).

27. See Tom Baker & Peter Siegelman, *Tontines for the Invincibles: Enticing Low Risks into the Health-Insurance Pool with an Idea from Insurance History and Behavioral Economics*, 2010 WIS. L. REV. 79 (2010); Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1 (2008); Anthony Kearns, *Risky Business: When It Comes to Managing Errors, Law Firms Could Learn Some Lessons from Airlines and Hospitals*, AM. LAW, Sept. 1, 2010, at 49.

28. See Jonathan Simon, *Edgework and Insurance in Risk Societies: Some Notes on Victorian Lawyers and Mountaineers*, in *EDGEWORK: THE SOCIOLOGY OF RISK-TAKING* 203–26 (2005). See generally *EMBRACING RISK*, *supra* note 23.

29. See Marc R. Poirier, *"It Was the Best of Times, It Was the Worst of Times . . .": Science, Rhetoric and Distribution in a Risky World*, 53 CASE W. RES. L. REV. 409 (2002); Dayna Nadine Scott, *Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution*, 46 OSGOODE HALL L.J. 293 (2008).

30. See Jonathan Simon, *Risk and Reflexivity: What Socio-Legal Studies Add to the Study of Risk and the Law*, 57 ALA. L. REV. 119 (2005).

31. See Tom Baker, *Embracing Risk, Sharing Responsibility*, 56 DRAKE L. REV. 561 (2008); Tom Baker & David Moss, *Government as Risk Manager*, in *NEW PERSPECTIVES ON REGULATION* 87–109 (David Moss & John Cisternino eds., 2009).

32. See Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. LAW & SOC. SCI. 397 (2005).

risk,³³ deal or transactional risk,³⁴ and risk allocation in global practice.³⁵ Well honed in matters of institutional control and regulation, this burgeoning literature emphasizes structural management practices, rather than nonstructural, “deep governance” norms,³⁶ such as the commitment to diversity, equal opportunity, and workplace equity. To begin, consider the basic form and content of risk management practices.

A. RISK MANAGEMENT

Like many in the field of risk management, Davis treats risk as a neutral concept tied to probability and economic loss.³⁷ He defines “risk” to mean “any danger that, if not controlled, may lead to consequences unintended by and harmful to a law firm or lawyer.”³⁸ From this definition, risk management refers to “the establishment of institutional (i.e., firm or practice-wide) policies, procedures, or systems . . . designed to minimize risk within the firm and its practice.”³⁹ At the same time, risk management refers to a firm “culture that promotes both awareness of the kinds of risks that the firm’s practice necessarily entails and actively supports compliance with the policies and procedures that the firm has adopted.”⁴⁰

On this calculus, Davis links structural governance variables and nonstructural, deep governance variables to norms of profit and efficiency. Both sets of management variables operate to identify, assess, and order risk.⁴¹ Because this order of operation combines economic self-interest with risk calculation and

33. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001); Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004); Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004); Joan T.A. Gabel, *The Peculiar Moral Hazard of Employment Practices Liability Insurance: Realignment of the Incentive to Transfer Risk with the Incentive to Prevent Discrimination*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 639 (2006).

34. See Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 VAND. L. REV. 1161, 1163 n.1 (2010); Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007, 2015-34 (2009).

35. See Anthony E. Davis, *New Age, Old Rules: An Outdated Regulatory Framework Puts U.S. Firms at a Competitive Disadvantage on the Global Stage*, AM. LAW., Oct. 1, 2010, at 65-66.

36. Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors’ and Officers’ Liability Insurer*, 95 GEO. L.J. 1795, 1820, 1837 (2007) [hereinafter Baker & Griffith, *The Missing Monitor in Corporate Governance*].

37. On neutrality in risk discourse, see DEBORAH LUPTON, RISK 8 (1999).

38. See Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 98 (citing DAVIS & JARVIS, *supra* note 24, at 3); see also *id.* at 98-99 (claiming definitional extension that goes “far beyond the risk of malpractice claims, and includes criminal prosecution (of individual lawyers and law firms collectively), professional discipline, claims for disgorgement of fees, malicious prosecution, sanctions, and other allegations of wrongful conduct in the course of law practice, and even law firm dissolution”).

39. *Id.* at 99 (citing DAVIS & JARVIS, *supra* note 24, at 4).

40. *Id.*

41. See Stephen Crook, *Ordering Risks*, in RISK AND SOCIOCULTURAL THEORY: NEW DIRECTIONS AND PERSPECTIVES 160, 161-75 (Deborah Lupton ed., 1999).

ethical deliberation, Davis contends that risk management boosts individual ethical deliberation within large law firms.⁴² In fact, he argues that risk management institutionalizes ethical values and gives them concrete technical form.⁴³ Indeed, he discerns a complementary relationship between the goals and the mechanics of risk management and the principles of legal ethics and professionalism.⁴⁴ Under this collaborative view, risk management educates lawyers in ethics, supports their decision-making, and reinforces their individual behavior through institutional culture and oversight.⁴⁵ In this sense, risk management presents a moral opportunity to model, prevent, and correct conduct.⁴⁶

Risk management norms and practices flow from internal institutional sources and external rule-based systems. Davis describes the relationship between internal risk management structures and external legal ethics systems in terms of “two symbiotically related fields of thought and endeavor.”⁴⁷ He denies that law firm risk management “somehow undermines individual lawyers’ responsibility to act ethically,” or that the “increased use of risk management will cause individual lawyers’ capacity for ethical deliberation to atrophy.”⁴⁸ Rather, he attempts “to show that risk management enhances individual ethical deliberation,” giving “concrete form” to and “institutionalizing” the values of legal professionalism.⁴⁹ In point of fact, he posits a “[complementary] relationship between the goals and the mechanics of risk management . . . and the principles of legal ethics and professionalism,” a relationship that he claims defies “*either* bureaucratic regimentation *or* unfettered individual lawyer discretion.”⁵⁰ In his view, risk management affords a “collaborative” model “in which law firms institutionally and lawyers individually interact in order to arrive at ethical decisions.”⁵¹ Thus, collaboratively fashioned, “risk management educates, supports, and reinforces ethical decision making on *both* the institutional *and* the individual levels” of the lawyering process.⁵²

42. See Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 95-96.

43. See *id.* at 96.

44. See *id.* at 113-24.

45. See *id.* at 96.

46. On moral opportunity and risk, see Jonathan Simon, *Risking Rescue: High Altitude Rescue as Moral Risk and Moral Opportunity*, in *RISK AND MORALITY* 375-406 (2003).

47. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 95.

48. *Id.* at 96.

49. *Id.*

50. *Id.* (emphasis in original).

51. *Id.*

52. *Id.* (emphasis in original).

The rationale for risk management, Davis explains, stems from the institutional desire to “improve the quality” of client services, “achieve greater profitability,” “enhance[] access to the professional liability insurance market,”⁵³ and help “identify and manage risks which, if not addressed, present the threat of significant adverse consequences.”⁵⁴ Such consequences, as here, may entail the disgorgement of attorneys’ fees, discovery sanctions, and federal discrimination charges. Davis’s appointed objectives attach “positive incentives” to “individual and collective self-interest,” correlated “to the greatest extent possible” to “improve efficiency and profitability.”⁵⁵ Davis attributes the failure to meet these objectives—for example, in the narrow context of client intake selection and conflicts of interest clearance—to “the absence of effective and appropriately supported risk management systems within the firm at large.”⁵⁶ Under this logic, the “real culprit” in errant ethical conduct lies with the firm or system, not the individual, in spite of the rogue lawyer conduct in the *Gellene* case.⁵⁷ Consequently, and not unreasonably, “firms that fail to consider *either* the adequacy of their client intake management infrastructure *or* the adequacy of the firm’s culture in supporting and encouraging compliance . . . unquestionably increase the likelihood” of recurrent individual or institutional misconduct.⁵⁸

To Davis, the ideal system for effective risk management identifies “risk management categories,” enumerates existing “procedures or systems,” and develops “strategies to control risk categories.”⁵⁹ The conduct at issue here—concurrent representation, discovery disclosure, and partner compensation—all signify risk categories. Comprehensive law firm risk management systems, Davis insists, “demonstrate the pervasive relationship between risk management and legal ethics” by building and operating a “segmented and structured” environment of authority and leadership,⁶⁰ consistent with supervisor-subordinate hierarchy and partner-associate leverage central to law firm design. To exert authority, he observes, law firm “management must have sufficient authority delegated by all partners to be able to control the practice of all the individual

53. On the role of the professional liability insurance market in lawyer regulation, see David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203 (2004); George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997).

54. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 99.

55. *Id.* at 100. Davis cites professional liability insurance rates as an additional consideration. *Id.* (“The availability of coverage, the size of deductibles, the limits available, the terms of coverage, and the price of malpractice insurance are more and more dependent on law firms’ ability to demonstrate to underwriters that they have adopted and institutionalized appropriate risk management systems.”).

56. *Id.*

57. *Id.* at 100, 102–03.

58. *Id.* at 100 (emphasis in original).

59. *Id.* at 102–03.

60. *Id.* at 103.

members of the firm without exception (and regardless of seniority).”⁶¹ For the purposes of leadership, he remarks, firm management “must actively, continuously, and consistently communicate to all the firm’s personnel its commitment to implement risk management throughout the firm.”⁶² That duty of communication applies equally to the corporate boardroom, trial courtroom, and law firm workplace.

In accordance with the hierarchical segmentation of law firm authority and leadership, Davis assigns risk management functions to law firm general counsel or to a risk management committee to carry out “the day-to-day functions of managing the practice to reduce risk.”⁶³ The assignment of practice and human resource management functions by law firms to a centralized authority or leadership group, he notes, “ensure[s] the quality of their individual lawyers’ services” and checks the potential misconduct of “individual lawyers or tightly knit groups of lawyers.”⁶⁴ Implementation of this checking or prevention function, he stresses, requires appropriate firm procedures and forms, clear instructions, and policies under the supervision of general counsel and the auspices of a firm-wide culture of compliance.⁶⁵ Supervision entails the “development, promulgation, and uniform enforcement of appropriate risk management policies, procedures, and systems throughout the law firm.”⁶⁶ Compliance expands lawyer loyalty obligations beyond individual superiors to encompass clients, colleagues, and the firm as a whole.⁶⁷

Precisely because “it is impossible to eliminate or avoid all risk,” Davis cautions that law firms must “realistically seek to manage risk within acceptable parameters.”⁶⁸ Those parameters, and the risks attendant to transactional representation, litigation discovery, and workplace retention, help mark the multijurisdictional and multinational limits of risk management across the large law firm legal services industry. To more fully appreciate the normative and operational limits of risk management, compare the notion of corporate risk governance in the context of large law firms.

61. *Id.*

62. *Id.*

63. *Id.* at 104 (contending that “the firm must delegate, in a coherent and centralized way, ongoing duties to control the individual categories of risk identified as concerns”); see also Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer’s Lawyer*, 53 U. KAN. L. REV. 835 (2005); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 103 (2000); Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411 (2008).

64. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 104–05.

65. *Id.* at 107.

66. *Id.* at 108; see also Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873 (2002); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786 (2009).

67. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 108.

68. *Id.* at 99.

B. RISK GOVERNANCE

The notion of risk governance interlinks the fields of corporate and law firm regulation. Astride of both fields, the concept of “deep governance,” borrowed from insurance scholars Tom Baker and Sean J. Griffith, comes out of the critical arena of tort regulation.⁶⁹ For Baker and Griffith, deep governance explicates “the role of . . . variables such as ‘culture’ and ‘character’” in corporate governance.⁷⁰ Distinct from the “formal governance structures” commonly associated with risk management, deep governance as engrafted here embraces the moral or normative commitments informing the character and culture of a law firm.⁷¹ Law firm institutional character and culture arise out of the interplay of baseline normative commitments, management protocols, ethics rules, and the actions of internal and external risk intermediaries. Internal intermediaries include general counsel and in-house ethics advisors.⁷² External intermediaries include insurance underwriters and outside auditors.⁷³ According to Baker and Griffith, intermediaries work to “package” and to “transfer” liability risk and cost, thereby transforming institutional and legal regulation.⁷⁴

Applied to law firm management, the concept of deep governance, with its emphasis on the decision-making function of corporate character and culture, illuminates the institutional construction and regulation of liability risk by partners and associates acting individually and collectively to weigh the costs and benefits of ethical compliance and moral agency in advocacy. Of necessity, law firms seek to construct and regulate litigation and transactional proceedings, assigning cost-related weights and measures to particular risk-taking activities. They do the same in the area of workplace governance, defining and transforming the meaning of diversity and discrimination. The upshot is an ethical system or *nomos*⁷⁵ of litigation advocacy, transactional negotiation, and workplace hiring

69. Baker & Griffith, *The Missing Monitor in Corporate Governance*, *supra* note 36, at 1820-21.

70. Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' and Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 490 (2007) [hereinafter Baker & Griffith, *Predicting Corporate Governance Risk*].

71. *Id.*

72. See Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63 (2009); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002).

73. See Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

74. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 490.

75. By *nomos*, I mean a moral universe implicitly or explicitly constructed by word and deed. See generally Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); see also NICHOLAS RESCHER, *RISK: A PHILOSOPHICAL INTRODUCTION TO THE THEORY OF RISK EVALUATION AND MANAGEMENT* 157-67 (1983); Alan Hunt, *Risk and Moralization in Everyday Life*, in *RISK AND MORALITY*, *supra* note 46, at 165-92; Cass R. Sunstein, *Moral Heuristics and Risk*, in *RISK: PHILOSOPHICAL PERSPECTIVES* 156-70 (2007).

embodied in law firm practices, traditions, and overall culture.⁷⁶

Venturing beyond the “easily observable factors” of law firm internal controls and protocols documented by Davis and exhibited in the instant case studies, deep governance for Baker and Griffith focuses on both the “culture of the firm” and the “character of its management.”⁷⁷ Culture-based risk assessment addresses “the system of incentives and constraints embedded within the firm.”⁷⁸ Incentives typically take the form of compensation and promotion.⁷⁹ Constraints routinely occupy the form of infrastructure hierarchy and supervision.⁸⁰ By comparison, character-based risk assessment deals with the behavior and identity or composition of management. Character-based managerial behavior registers in actions that enforce rule compliance or “rationalize” rule noncompliance.⁸¹ Character-based managerial identity reflects in the staffing of leadership ranks with either prudent “risk-takers” or “risk-takers above the norm.”⁸²

Within corporate organizations and large law firms, culture and character fuse with a “tournament-style” organizational structure.⁸³ To compete in corporate tournaments, Baker and Griffith argue, “executives must cultivate traits such as ‘over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception.’”⁸⁴ However, they add, the “very traits that enable executives to succeed also put the firms they manage at greater risk of fraud and failure.”⁸⁵ Examples of this social “dynamic” of risk cultivation are displayed here by the underlying individual lawyer misconduct in the *Gellene* prosecution and the

76. See Elizabeth Chambliss, *Measuring Law Firm Culture*, in STUDIES IN LAW, POLITICS, AND SOCIETY: SPECIAL ISSUE: LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE 1-31 (2010) [hereinafter STUDIES IN LAW]; Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2005); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998).

77. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 540.

78. *Id.*

79. See Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63 (2009); Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397 (2006).

80. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002); see also Tanina Rostain, *Partners and Power: The Role of Law Firm Organizational Factors in Attorney Misconduct*, 19 GEO. J. LEGAL ETHICS 281 (2006).

81. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 524.

82. *Id.* at 540.

83. *Id.*; see also MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909 (2004); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

84. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 540 (quoting Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons From the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004) [hereinafter Langevoort, *Resetting the Corporate Thermostat*]).

85. *Id.*

failure of Milbank to detect and to deter such misconduct,⁸⁶ as well as by the less controversial yet still questionable litigation team conduct in *Qualcomm* and firm management conduct in *Kelley Drye*.

The tournament structure of compensation and promotion prevalent in the legal services industry rewards risk-taking behavior by lawyers and law firms. To Baker and Griffith, the presence of an analogous "high-stakes promotion tournament" structure in corporate organizations encourages a "hypercompetitive culture" that in turn "breeds a certain kind of character: one with a tendency to equate what is self-serving with what is right."⁸⁷ Building on the work of Donald Langevoort in the area of securities regulation,⁸⁸ Baker and Griffith reference Langevoort's term "ethical plasticity" to describe this self-serving character trait common among corporate executives.⁸⁹ By definition, ethical plasticity implies the willingness and ability to deceive others. Langevoort, Baker, and Griffith point out that corporate actors "who best deceive others are usually those who have deceived themselves," observing that such actors "operate in a cognitively unconflicted way."⁹⁰ Equipped with the "best survival prospects in the corporate tournament," a Machiavellian corporate actor, Langevoort, Baker, and Griffith together note, stands "especially adept at rationalization: convincing himself as well as others that what is self-serving is also right."⁹¹ Inside the large law firm legal services industry, *right* judgments in litigation, transactional, and employment decisions consistently accord with the entrepreneurial goals of productivity and profit maximization consonant with individual and institutional economic self-interest.

In tracking the organizational behavior of corporate firms beset by weak internal controls, intense competition, and self-serving managers, Baker and Griffith identify patterns of destructive risk carved in pursuit of entrepreneurial goals. Pressed by managerial risk-takers, normally corporate directors and officers, the goals operate as a kind of revealed preference.⁹² In the context of law

86. *Id.*; see *United States v. Gellene*, 24 F. Supp. 2d 922 (E.D. Wis. 1998).

87. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 541 (internal quotations omitted).

88. See Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71; Donald C. Langevoort, *Opening the Black Box of "Corporate Culture" in Law and Economics*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 80 (2006); Langevoort, *Resetting the Corporate Thermostat*, *supra* note 84; Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002).

89. Baker & Griffith, *Predicting Corporate Governance Risk*, *supra* note 70, at 541 (quoting Langevoort, *Resetting the Corporate Thermostat*, *supra* note 84).

90. *Id.* (quoting Langevoort, *Resetting the Corporate Thermostat*, *supra* note 84).

91. *Id.* at 540-41 (quoting Langevoort, *Resetting the Corporate Thermostat*, *supra* note 84) ("Executives with this type of character in this kind of culture are among the most likely to lead their organizations into a spiral of ever greater risk taking and, when their luck finally sours, to convert risk taking into fraud.").

92. *Id.* at 542-43.

firm risk evaluation, entrepreneurial preference affects both the structural governance variables of ethics rules and internal controls, and the nonstructural, deep governance variables of culture and character. Awake to the complexity of risk evaluation and the force of entrepreneurial preference, Davis contends that a culture of compliance “alone” furnishes an insufficient “basis for uniform risk management practices.”⁹³ And yet, in summoning the application of external ethics rules, Davis neglects the troubling impulse of risk deniability and its adverse impact on lawyer integrity. Turn next to an analysis of risk governance, deniability, and integrity in the context of legal ethics rules and the legal profession more generally.

II. RISK DENIABILITY AND INTEGRITY

Risk deniability and integrity stand largely outside Davis’s risk management scheme. To be sure, Davis does make mention of the self-rationalizing tendencies of individual lawyers or groups of lawyers in deal or litigation teams. He also suggests that his rule-to-practice management axiom comports with or satisfies integrity norms, though his assumption that ethics rule compliance serves as the necessary and sufficient condition for lawyer integrity remains unstated and untested. Even so bolstered, his management axioms and norms reveal the scant moral aspiration and spare social function of lawyers in advancing legality and justice. Encumbered by the profit and productivity demands of material self-interest, the norms encourage technical rule computations to mitigate risk-taking behavior detrimental to lawyer or law firm prosperity, rather than to legality and justice.⁹⁴ Like many lawyers entangled in large law firm culture, Davis denies the normative insufficiency of lawyer private self-interest and law firm profitability. Luban, though, addresses the practice of lawyer deniability through his analysis of contrived ignorance and integrity in legal ethics.⁹⁵ Consider first Davis’s asserted integration of risk management systems and legal ethics rules.

A. RISK MANAGEMENT AND LEGAL ETHICS

Davis argues that “the relationship between legal ethics and risk management is entirely complementary.”⁹⁶ Moreover, he declares “the falsity of [the] notion that ‘[t]he systemic preference for private values in risk management regulation

93. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 109.

94. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1933–37.

95. See David Luban, *Contrived Ignorance*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 22, at 209. For a helpful compilation of ethics integrity rules, see Fred C. Zacharias, *Integrity Ethics*, 22 *Geo. J. Legal Ethics* 541, 559–62 (2009).

96. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 113.

undermines the aspirational tradition of legal professionalism.”⁹⁷ Here, those aspirations may go to co-client candor in *Gellene*, court and adversarial disclosure in *Qualcomm*, or workplace equity in *Kelley Drye*. For Davis, risk management works to “encourage aspirations while simultaneously securing compliance.”⁹⁸ He points out, for example, that risk management “has a role when individuals identify an ethical issue, but . . . rationalize a course of action that an independent observer would regard as ethically inappropriate or otherwise problematic.”⁹⁹ This cognitive checking function, however, is limited to recognizing ethical issues.¹⁰⁰ Actual “resolution,” he insists, must come from individual lawyers “in discussions with general counsel or others at the firm regarding the appropriate resolution of ethical issues.”¹⁰¹ If collaboratively pursued, he adds, the process of resolution will “likely” help individual lawyers “to develop more sophisticated capacities for ethical deliberations than they would be able to on their own.”¹⁰² In this way, Davis concludes, “risk management actually promotes individual lawyers’ ethical growth.”¹⁰³

Furthermore, Davis contends that risk management “does not in any way detract from each individual lawyer’s duties to act in accordance with the rules.”¹⁰⁴ Although “centralized,” management structures nonetheless provide “oversight of ethical compliance” and operate to “support and affirm each individual lawyer’s professional responsibility obligations.”¹⁰⁵ To Davis, this compliance-reinforcing function serves to “enable *both* law firms as institutions *and* lawyers as individuals to make more informed and (hopefully) better moral decisions and ethical judgments.”¹⁰⁶ Better judgments and “more nuanced discussion” in turn act to “promote uniform knowledge of and compliance with ethics rules” governing, for example, conflicts of interest or fact investigation and discovery.¹⁰⁷

For Davis, good risk assessment goes well beyond “technical application” or “strict compliance with the legalities of the ethics rules.”¹⁰⁸ Indeed, he contends, “risk management incorporates considerations such as the likely reactions of the

97. *Id.* (quoting Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1939).

98. *Id.* (quoting Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1970 (2006)).

99. *Id.* Davis remarks that lawyer-law firm “dialogue will evidently take account of the individual lawyer’s perspective including his ethical judgment which may be to minimize the significance of the conflict or to seek a route to a possible waiver—whereas the law firm can look at the issue from the perspective of the entire organization.” *Id.* at 120.

100. *Id.* at 113–14.

101. *Id.* at 114.

102. *Id.*

103. *Id.*

104. *Id.* at 115.

105. *Id.*

106. *Id.* at 118–19 (emphasis in original).

107. *Id.* at 119–20.

108. *Id.* at 120.

public, and of clients, and the spirit, not merely the letter, of the law.”¹⁰⁹ Cast broadly, its systemic purpose is to “elevate the level of ethical decision making by both the individual and the law firm, and in no way to inhibit moral decision making by either.”¹¹⁰ In this way, risk management is not only “the practical embodiment and the means of implementation of the ethical rules that govern lawyers’ conduct,” but also “the necessary component that translates the ethics rules into practice within law firms.”¹¹¹ On this unbounded logic, the rule-to-practice ethical translation effected by risk management practices ameliorates transactional representation, litigation conduct, and workplace governance. The next section considers the phenomenon of risk deniability in this equation and its moral consequences for lawyering and law firm management.

B. DENIABILITY AND WILLFUL IGNORANCE

Luban defines deniability in terms of a lawyer’s capacity to deny guilty knowledge truthfully.¹¹² To Luban, deniability functions as a stratagem “to avoid facts that the lawyer really doesn’t want to know,”¹¹³ whether in advocacy, negotiation, or workplace hiring and promotion. He connects deniability to willful ignorance,¹¹⁴ focusing on a lawyer’s or a law firm’s deliberate efforts to avoid guilty knowledge prior to committing any misdeed—in this case Gellene’s conflict of interest and Milbank’s concurrent representation in the Bucyrus-Erie bankruptcy as well as Kelley Drye’s enforcement of its age-based partner de-equitization policy. The structure of deniability in organizations like Milbank and Kelley Drye screens individuals—partners and associates—from liability for ethical misdeeds, especially when they act at a distance with imperfect information.¹¹⁵ Together, institutional distance and imperfect information permit individual lawyers to avoid acknowledging their affirmative screening actions and unwitting misdeeds.¹¹⁶ Screening actions or omissions shield lawyers from unwanted knowledge, for example, of conflicts of interest, discovery abuse, or age discrimination. Unwitting misdeeds, such as concurrent representation or

109. *Id.*

110. *Id.*

111. *Id.* at 123–24.

112. Alfieri, *Jim Crow Ethics*, *supra* note 22, at 1689–99.

113. Luban, *Contrived Ignorance*, *supra* note 95, at 210. For David Luban, “[d]eniability is the key to succeeding at the world’s work, which is often dirty, while keeping a clean conscience.” *Id.* at 211.

114. *Id.* at 211–13.

115. *Id.* at 216 (remarking that “supervisors structure the organization to preserve their own deniability”); see also Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 306–08 (1997); Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 KY. L.J. 231, 263–73 (2008); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 12–20 (2005); Thomas A. Kuczajda, Note, *Self Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119, 126–36 (1998).

116. See Luban, *Contrived Ignorance*, *supra* note 95, at 213–22.

discovery nondisclosure, fall innocent when performed out of legitimate ignorance rather than with varying degrees of individual and institutional *mens rea*—here, willfulness, knowledge, recklessness, or negligence.¹¹⁷

For Luban, ignorance obtained from wrongfully screening oneself from guilty knowledge is itself blameworthy. Under his culpable-ignorance theory, both the wrongful screening action and the “unwitting misdeed” share blame because screening actions put the lawyer on notice of potential wrongdoing.¹¹⁸ This implied principal-agent complicity unites screening actions and wrongful misdeeds into a single framework of analysis applicable when the lawyer-as-agent ratifies the screening decision of the lawyer-as-principal to avoid potentially guilty knowledge.¹¹⁹ Complicity links willful blindness to a culpable state of mind for unwitting misdeeds.¹²⁰ Milbank’s complicity in Gellene’s ethical misconduct rises out of its willful institutional ignorance of inconvenient knowledge pertaining to conflicts of interest¹²¹ and the related lack of candor among its bankruptcy and corporate partners, a form of ethical opacity common to large firm corporate litigation conduct.¹²² Both misdeeds implicate questions of integrity and dissonance.

C. DENIABILITY AND DISSONANCE

Luban searches social psychology to determine the psychic machinations of lawyer deniability and conduct-principle dissonance in belief modification and social cognition.¹²³ Lawyers struggle to overcome cognitive dissonance, he explains, either by modifying their conduct to conform to their principles or by modifying their principles and prior beliefs, here in cases of transactional counseling and litigation candor. Principle-driven conformity risks inflexibility, for example, when conflicts of interest preclude joint representation, while belief modification risks counter-attitudinal actions, for example, when candor de-

117. *Id.* at 222–23.

118. *Id.* at 225.

119. *Id.*

120. *See id.* at 211.

121. *See id.* at 229–36; *see also* Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 *FORDHAM L. REV.* 1805, 1807–09 (2002); W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1577–86 (2003).

122. *See* Luban, *Contrived Ignorance*, *supra* note 95, at 234–35 (discussing the ethical and moral repercussions of lawyers engaging in “willful blindness”); *see also* Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 716–19 (1998) (attributing aggressive and dishonest litigation tactics in part to law firm culture and structural causes).

123. *See generally* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 *VAND. L. REV.* 1499 (1998); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 *BROOK. L. REV.* 629 (1997); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 *VAND. L. REV.* 75 (1993).

volves into nondisclosure.¹²⁴ Luban observes self-rationalizing “counterattitudinal advocacy” in the moral world of lawyers and law firms, such as age-driven partner de-equitization, a world of continuous after-the-fact justification motivated by cognitive threats to the integrity of an individual’s self-concept.¹²⁵ He asserts that lawyers intuitively refashion their moral beliefs and perceptions to rationalize their own behavior.¹²⁶ Counter-attitudinal advocacy, he notes, typically channels beliefs toward the goals of client advocacy, as in *Gellene* and *Qualcomm*, though the more self-regarding goals of profit maximization and promotion may suffice as well, as in *Kelley Drye*.¹²⁷ Institutional contexts—for example, law firms—influence this cognitive channeling, shaping individual and collective worldviews through the reciprocal reinforcement of perception and belief in practice groups and litigation or deal teams.¹²⁸

Unlike Davis, Luban acknowledges that the litigation and transactional situations within law firms, practice groups, and advocacy or deal teams may not only dominate individual personality,¹²⁹ but also overpower moral character, here resulting in transactional misconduct, discovery abuse, and workplace discrimination.¹³⁰ Yet, citing belief-action variation among individuals,¹³¹ Luban endorses personality theory and the viability of situational dissent in spite of environmental pressure and temptation.¹³² This opposition to situational determinism and institutionally scripted roles preserves the possibility of moral discretion and professional integrity in regulating deal transactions, litigation contests, and workplace hiring decisions.¹³³

To Luban, moral discretion reasons contextually from an applied set of right or reasonable principles.¹³⁴ Professional integrity rests on value-action harmony or

124. See David Luban, *Integrity: Its Causes and Cures*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 267, 268 [hereinafter Luban, *Integrity*].

125. *Id.* at 269; see also Richard W. Painter, *Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1413-24 (2000); William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 268-82 (1998).

126. Luban, *Integrity*, *supra* note 124, at 268.

127. See *id.* at 269-71.

128. See *id.* at 271-81.

129. See *id.* at 281 (“[T]here are no selves, only selves-in-roles, selves who slide frictionlessly from role to role, in each case conforming to the expectations of the role and whatever principles of right behavior come attached to its script.”).

130. See *id.* at 281-82.

131. *Id.* at 283.

132. David Luban, *The Ethics of Wrongful Obedience*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 237, 245-47.

133. Luban, *Integrity*, *supra* note 124, at 284-85; see also Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629 (2002); Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 FORDHAM L. REV. 333 (2003) [hereinafter Rhode, *If Integrity is the Answer*].

134. See Luban, *Integrity*, *supra* note 124, at 286-87 (citing Rhode, *If Integrity is the Answer*, *supra* note 133, at 335-36).

equilibrium in practice.¹³⁵ Of necessity, both discretion and integrity require line-drawing, counter-intuitive reflection, and chronic skepticism.¹³⁶ Embodied in Luban's Socratic "stance of perpetual doubt toward one's own pretensions as well as the pretensions of others" in the world, a stance that instills the crucial "habit of doubting one's own righteousness, of questioning one's own moral beliefs, of scrutinizing one's own behavior,"¹³⁷ these cognitive and interpretive strategies seem distressingly absent from Davis's compliance-reinforcing systems of risk management.¹³⁸ Likewise, they seem lacking in each of the three instant case studies, gauged by either moral reasoning or behavioral insight. To further appreciate the normative insufficiency of Davis's paradigm of private self-interest and law firm profitability, consider the risks of lawyer deniability and contrived ignorance in the litigation, transactional, and workplace settings of the case studies below.

III. RISK DENIABILITY: THREE CASE STUDIES

Risk deniability infects the transactional, litigation, and workplace employment conduct of lawyers and law firms. The risks of lawyer deniability and contrived ignorance in law firm employment and retention, concurrent transactional representation, and complex litigation discovery find useful illustration in the below studies of the *Kelley Drye*, *Gellene*, and *Qualcomm* cases. At the outset, turn to the state of Big Law diversity and, more specifically, to the discrimination risk embedded in the still ongoing employment dispute in *Kelley Drye*.

A. DISCRIMINATION RISK: BIG LAW DIVERSITY

Risk governance and diversity variables related to the large firm legal services industry intersect throughout the lawyer hiring, promotion, and retention process. Within the large firm workplace, that employment process routinely involves the consideration and assessment of exclusion and inclusion risks. Under Davis's paradigm, both exclusion and inclusion risks involve the analysis of probability and economic loss. Exclusion risk refers to the danger of unintended and harmful consequences to a law firm stemming from a decision to *exclude* a diversity candidate from hiring, promotion, or retention as a partner or an associate. Conversely, inclusion risk refers to the danger of unintended and harmful consequences to a law firm flowing from a decision to *include* a diversity candidate in hiring, promotion, or retention as a partner or an associate. The institutional calculation of exclusion and inclusion risk affects the quality and

135. See *id.* at 274.

136. See *id.* at 286–88, 296–97.

137. *Id.* at 297.

138. See *id.* at 285–97.

quantity of workplace diversity in the legal services industry across differences of age, gender, and race.

The history of discrimination in the American legal profession is far reaching.¹³⁹ By now well chronicled, this history spans a plurality of intersecting identities crisscrossing gender, race, ethnicity, disability, sexuality, and, more recently, age.¹⁴⁰ Gender discrimination, infecting workplace structures¹⁴¹ and pervading law firms,¹⁴² continues to garner critical attention.¹⁴³ Evidence suggests that gender discrimination persistently hampers women's advancement in large law firms¹⁴⁴ and inhibits their promotion to partnership and other positions of firm leadership.¹⁴⁵ Despite various diversity initiatives,¹⁴⁶ partners,¹⁴⁷ associates,¹⁴⁸ and even student summer associates regularly encounter gender-based workplace constraints,¹⁴⁹ alternate partnership tracks,¹⁵⁰ and other

139. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); NEW YORK CITY BAR, 2010 LAW FIRM DIVERSITY BENCHMARKING REPORT: REPORT TO SIGNATORIES OF THE STATEMENT OF DIVERSITY PRINCIPLES (2010), available at <http://nylj.com/nylawyer/adgifs/decisions/012611barreport.pdf>; Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008).

140. See ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* (2010), available at http://www2.americanbar.org/centers/diversity_migrated/PublicDocuments/Next%20Steps%20Final-Virtual%20Accessible%20042010.pdf.

141. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); see also Note, *A Proposal for Law Schools to Combat Structural Discrimination at Law Firms Through Management-Based Regulation*, 120 HARV. L. REV. 2156 (2007).

142. See generally Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859 (2005); María Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53 (2008); Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1054-57; Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007); Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789 (2004).

143. See Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1059-72; Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001 (2002); Deborah L. Rhode & Diane C. Yu, *The ABA Goal IX Commission Reports: Tracking Progress and Trends*, PERSPECTIVES, Summer 2008, at 16.

144. See Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245 (2010).

145. See Fiona M. Kay & John Hagan, *Cultivating Clients in the Competition for Partnership: Gender and the Organizational Restructuring of Law Firms in the 1990s*, 33 LAW & SOC'Y REV. 517 (1999); Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1042-44.

146. On diversity initiatives, see Joanne P. Braithwaite, *Diversity Staff and the Dynamics of Diversity Policy-Making in Large Law Firms*, 13 LEGAL ETHICS 141 (2010); Anjali Chavan, Note, *The "Charles Morgan Letter" and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521 (2010).

147. See Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413 (2005).

148. See Ernest F. Lidge III, *Law Firm Employment Discrimination in Case Assignments at the Client's Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159 (2005).

149. See Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229 (2000); Nancy J. Reichman & Joyce S.

forms of harassment¹⁵¹ and inequality¹⁵² that adversely impact upon earnings, satisfaction, and retention.¹⁵³ Attributable in part to differential treatment of childbearing and child rearing family responsibilities,¹⁵⁴ as well as mentoring system failure,¹⁵⁵ gender discrimination often merges with racial bias to doubly burden women of color.¹⁵⁶

Lawyers of color, particularly African American lawyers,¹⁵⁷ often suffer race-based discrimination in large law firms, even subsequent to promotion and partnership.¹⁵⁸ Likewise, Asian American,¹⁵⁹ Latino/a,¹⁶⁰ and other minority

Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002).

150. See Vivia Chen, *Looking into the Equity Box*, AM. LAW., Sept. 2010, at 13; Danielle M. Evans, Note, *Non-Equity Partnership: A Flawed Solution to the Disproportionate Advancement of Women in Private Law Firms*, 28 WOMEN'S RTS. L. REP. 93 (2007); see also William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006).

151. See Jay Marhoefer, Note, *The Quality of Mercy Is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHI.-KENT L. REV. 817 (2003).

152. See Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361 (2009).

153. See Joan C. Williams & Veta T. Richardson, *New Millennium, Same Glass Ceiling?: The Impact of Law Firm Compensation Systems on Women* (2010), available at <http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf>; Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27 (2004).

154. See Heather Bennett Stanford, *Do You Want to Be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination*, 17 AM. U. J. GENDER SOC. POL'Y & L. 627 (2009); Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393 (2007); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008); see also Christen Linke Young, Note, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 YALE L.J. 1182 (2009).

155. See Elizabeth K. McManus, *Intimidation and the Culture of Avoidance: Gender Issues and Mentoring in Large Firm Practice*, 33 FORDHAM URB. L.J. 217 (2005).

156. See Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties that Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317 (2008).

157. See Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785 (2003); John M. Conley, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831 (2006); Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553 (2010); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004) [hereinafter Wilkins, *From "Separate is Inherently Unequal"*]. See generally James Lindgren, *The Private and Public Employment of African-American Lawyers, 1960–2000*, 17 J. CONTEMP. LEGAL ISSUES 281 (2008).

158. See David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY LEGAL ETHICS 15 (1999).

159. See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010); Akshat Tewary, *Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN L.J. 1 (2005).

160. See Cruz Reynoso, *A Survey of Latino Lawyers in Los Angeles County—Their Professional Lives and Opinions*, 38 U.C. DAVIS L. REV. 1563 (2005).

lawyers¹⁶¹ confront a racialized legacy of bias and discrimination,¹⁶² notwithstanding the myth of meritocracy in the legal profession.¹⁶³ Current demographic changes¹⁶⁴ and regulatory debates over partnership rules¹⁶⁵ have extended that legacy to include age discrimination.

Documented in a variety of employment settings,¹⁶⁶ especially where mandatory retirement policies operate,¹⁶⁷ age discrimination disputes now emerge with greater frequency in large law firm contexts.¹⁶⁸ Incidents of discrimination often involve the de-equitization and expulsion of older partners.¹⁶⁹ Recent challenges to partner de-equitization in *EEOC v. Sidley, Austin, Brown & Wood*¹⁷⁰ and in

161. See Emily Barker, *One Step Back*, AM. LAW., Mar. 2010, at 71. On color, marginal whiteness, and whiteness studies, see Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010).

162. See Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85 (2009).

163. See Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996).

164. See Marc Galanter, "Old and In the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WISC. L. REV. 1081 (1999); see also American Bar Association Urges Law Firms to Jettison Mandatory Age-Based Retirement, 76 LAW. MANUAL PROF. CONDUCT 2108 (2007); Panel Speakers Discuss Increase in Ranks of Older Lawyers, *Implications for Profession*, 22 LAW. MANUAL PROF. CONDUCT 89 (2006).

165. See Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3 (2004); Martha Neil, *Who Is a Partner? The EEOC Looks Beyond Titles in Its Age Discrimination Case Against a Law Firm*, 91 A.B.A. J. 34 (2005); Catherine Lovly & Matthew J. Mehnert, Note, *Something Every Lawyer Needs to Know: The Employer-Employee Distinction in the Modern Law Firm*, 21 HOFSTRA LAB. & EMP. L.J. 663 (2004).

166. See Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361 (2005); Jessica Fink, *A Crumbling Pyramid: How the Evolving Jurisprudence Defining 'Employee' Under the ADEA Threatens the Basic Structure of the Modern Large Law Firm*, 6 HASTINGS BUS. L.J. 35 (2010); Michael E. Franke, Note, *Age Discrimination Under the Age Discrimination in Employment Act: A Two-Way Street Blocked in One Direction*, 42 BRANDEIS L.J. 673 (2004).

167. See Lillian Kim, Comment, *Mandatory Retirement in the Private Sector: The Reach (or Inapplicability) of the Age Discrimination in Employment Act Domestically and Abroad*, 12 U. PA. J. BUS. L. 1209 (2010); Anna P. Stern, Note, *Heeding the Call for the End of Mandatory Retirement*, 21 GEO. J. LEGAL ETHICS 1095 (2008).

168. See Donald J. Labriola, Comment, *"But I'm Denny Crane!": Age Discrimination in the Legal Profession After Sidley*, 72 ALB. L. REV. 367 (2009); Lorie A. Taylor, Comment, *Age Discrimination Against Senior Law Firm Partners: When Law Firms Treat Partners as Employees*, 6 DUQ. BUS. L.J. 227 (2004); see also Marc Galanter, *Tournament of Jokes: Generational Tension in Large Law Firms*, 84 N.C. L. REV. 1437 (2006).

169. See Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEXAS TECH. L. REV. 449, 463-65 (2011); Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93 (2009); Nelson D. Schwartz, *Easing Out the Gray-Haired. Or Not.*, N.Y. TIMES, May 30, 2011, <http://www.nytimes.com/2011/05/28/business/economy/28worker.html?pagewanted=all>; Debra Cassens Weiss, *Law Firms Use Downturn as Opportunity to Ax Older Partners, Recruiter Says*, A.B.A. J., May 2009, http://www.abajournal.com/news/article/law_firms_use_downturn_as_excuse_to_ax_older_partners_recruiter_says.

170. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). For background on the initial EEOC investigation, see *EEOC v. Sidley & Austin*, No. 01-C-9635, 2002 WL 206485 (N.D. Ill. Feb. 11, 2002), and subsequent history of the 2005 ADEA suit, see *EEOC v. Sidley Austin Brown & Wood LLP*, 406 F. Supp. 2d 991 (N.D. Ill. 2005). See also Leonard Bierman & Rafael Gely, *So, You Want to Be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969 (2003); David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264 (2007); Rachel M. Milazzo, Note, *Circular Definitions of What Constitutes an*

*EEOC v. Kelley Drye & Warren, LLP*¹⁷¹ brought under the federal Age Discrimination in Employment Act¹⁷² (ADEA) illustrate these rising trends. Reported declines in domestic and global law firm “gross revenue, profits, and productivity (as measured by revenue per lawyer) from 2007 to 2009”¹⁷³ at leading firms seem likely to accelerate age-specific de-equitization and expulsion trends while the legal services market stabilizes.¹⁷⁴

Discrimination risk, and the allied concept of exclusion and inclusion risk, constitutes a structural and nonstructural variable in Big Law workplace hiring, promotion, and retention. From a structural standpoint, discrimination risk is subject to management regulation through hiring and promotion protocols, mentoring systems, and retention procedures. From a nonstructural perspective, discrimination risk is susceptible to deep governance regulation under cultural norms of diversity, equal opportunity, and workplace equity. The ongoing controversy in *Kelley Drye* shows the strength of discrimination risk in large law firms and the weakness of structural and nonstructural compliance regulation relevant to diversity.

The Equal Employment Opportunity Commission (EEOC)¹⁷⁵ instituted a civil action in January 2010 under the Age Discrimination in Employment Act¹⁷⁶ charging Kelley Drye with unlawful age-based discriminatory employment practices and retaliation against Eugene T. D’Ablemont and a similarly situated class of employees.¹⁷⁷ D’Ablemont, age seventy-nine at the commencement of the action, joined Kelley Drye in 1959, reached “Partner” status in 1969, and converted to “Life Partner” status in 2000.¹⁷⁸ The EEOC alleged that Kelley Drye created a compensation system that “significantly undercompensated” D’Ablemont and other attorneys who continued to perform work past the age of seventy “solely on the basis of their age.”¹⁷⁹ More specifically, the EEOC claimed that

Employee: Determining Whether the Partners of Sidley Austin Brown & Wood Qualify as Employers or Employees Under Federal Law, 51 ST. LOUIS U. L.J. 1329 (2007).

171. See Press Release, Equal Employment Opportunity Comm’n, *EEOC Sues Law Firm Kelley Drye & Warren for Age Discrimination and Retaliation* (Jan. 28, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-28-10a.cfm>.

172. See 29 U.S.C. §§ 621-634 (2006).

173. Michael D. Goldhaber, *Losing Ground*, AM. LAW., Oct. 2010, at 131, 131.

174. William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395 (2009).

175. The EEOC is a federal agency charged with the administration, interpretation, and enforcement of the Age Discrimination in Employment Act (ADEA). See Complaint and Jury Trial Demand at 1-2, *EEOC v. Kelley Drye & Warren, LLP*, No. 10 Civ. 0655, 2010 WL 442091 (S.D.N.Y. Jan. 28, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv00655/357752/1>.

176. 29 U.S.C. § 626(b) (2010).

177. Complaint and Jury Trial Demand, *supra* note 175, at 1.

178. Preliminary Pre-trial Statement at 3, *EEOC v. Kelley Drye & Warren, LLP*, No. 10 Civ. 0655 (LTS) (S.D.N.Y. Apr. 30, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv00655/357752/9/>.

179. Complaint and Jury Trial Demand, *supra* note 175, at 1.

Kelley Drye, since at least 2001, “operated under a Partnership Agreement that requires all attorneys who reach the age of 70 and wish to continue to practice law to give up any equity interest” in the law firm.¹⁸⁰ Further, the EEOC claimed that the Partnership Agreement dictated that D’Ablemont and others similarly situated “relinquish their authority to manage or significantly influence the firm,” and limit their compensation for work performed to “an annual ‘bonus’ payment” distributed at the discretion of the firm’s Executive Committee,¹⁸¹ even when such compensation proved “significantly less than that paid to younger attorneys in the firm with similar client collections, billings, and other measures of productivity.”¹⁸² For relief, the EEOC requested a permanent injunction enjoining Kelley Drye from engaging in age-based discriminatory employment practices, an order directing the firm to implement policies, practices, and programs that provide equal employment opportunities for employees forty years of age and older and that eradicate the effects of past and present unlawful employment practices, and an order awarding back wages, compensatory, liquidated, and punitive damages, prejudgment interest, and costs.¹⁸³ In April 2010, Kelley Drye denied the EEOC’s allegations of discrimination,¹⁸⁴ nonetheless, the firm quickly revised its mandatory retirement policy of senior partner de-equitization.¹⁸⁵

The discrimination risk in *Kelley Drye* strains Davis’s risk management model of regulation. Although the elaboration of structural, age-specific retention procedures and nonstructural, age-based diversity norms might enlarge the ambit of his regulatory model, the express overarching commitment to economic self-interest realized through profit and productivity militates against effective expansion. Moreover, notwithstanding Davis’s rule-to-practice axiom, ethics rules supply little or no countervailing force against the weight of the blunt lawyer and law firm self-interest manifested in *Kelley Drye*. In the same way, exclusion risks offer meager regulatory incentive. Here, for example, there is no fear of labor pool contraction or revenue loss, scarce concern about social capital

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 3-4. The EEOC added:

In 2008, subsequent to his filing his ADEA charge with the [EEOC], [the firm]’s annual ‘bonus’ payment to D’Ablemont was reduced from \$75,000 to \$25,000, even though his collections and other measures of productivity were similar to those in previous years, in retaliation for his complaining about [the firm]’s discriminatory compensation system and his filing of his charge with the [EEOC].

Id. The EEOC subsequently charged that such retaliation continued in 2009 and 2010. Amended Complaint and Jury Trial Demand at 4, EEOC v. Kelley Drye & Warren, LLP, No. 10 Civ. 0655 (LTS) 2010 WL 4019013 (S.D.N.Y. July 8, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv00655/357752/20>.

183. Complaint and Jury Trial Demand, *supra* note 175, at 4-5.

184. Answer, EEOC v. Kelley Drye & Warren, LLP, No. 10 Civ. 0655 (LTS) (S.D.N.Y. Apr. 5, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv00655/357752/7/>.

185. Nate Raymond, *Facing EEOC Suit, Kelley Drye Drops Retirement Policy*, N.Y. L.J., Apr. 9, 2010, at 1.

erosion and institutional succession, and no apprehension over human capital attrition and replacement cost, rather only an efficiency-driven economic calibration of litigation and settlement (i.e., "cash out") cost. These conscious, cost-benefit calculations leave discrimination risk largely unregulated in Big Law workplaces. Compare this regulatory outcome to the management of transactional risk.

B. TRANSACTIONAL RISK: CONFLICTS OF INTEREST

Transactional risk emanating from conflicts of interest falls within the helpful frameworks erected by Regan¹⁸⁶ and Simon¹⁸⁷ for the analysis of moral discretion and other-regarding obligations in large law firms. My previous analysis employed Regan's corporate law research as a starting point for an assessment of law firm risk management norms.¹⁸⁸ Regan describes the prosecution of Milbank partner John Gellene for making false declarations in a corporate bankruptcy proceeding.¹⁸⁹ For many, Gellene's prosecution signals the breakdown of classical norms of professionalism in lawyer regulation and law firm organization. Regan's account locates this normative disintegration in the context of large law firm corporate bankruptcy practice, thereby connecting the partnership tournament at Milbank to the norms of transactional lawyers in large firms and the moral universe constructed by elite teams of specialists within corporate and bankruptcy law.¹⁹⁰

Regan traces the evolution of the large law firm from the late nineteenth century to the early twenty-first century, charting the rise of new market pressures and global corporate competition.¹⁹¹ These cultural and socioeconomic forces, he explains, rationalized law firm hierarchical infrastructures, reorganized practice groups, encouraged institutional merger and migration, and instilled entrepreneurial revenue incentives.¹⁹² The industry-wide result enlarged the influence of partnership tournaments, practice specialties, and project teams on lawyer behavior and moral discretion. This shift is illustrated by Milbank's adoption of a new business plan in the mid-1980s, which emphasized revenue generation and lateral partner recruitment from rival firms specializing in lucrative corporate practice areas.

186. See REGAN, *supra* note 6; see also Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931 (2002); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999).

187. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 6; see also William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985 (2006).

188. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1933–40.

189. REGAN, *supra* note 6, at 235–88.

190. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1911–13.

191. REGAN, *supra* note 6, at 30–32.

192. *Id.* at 34–37.

Gellene's prosecution follows from Milbank's transition from an old-line, Wall Street law firm into an entrepreneurial culture of partner competition over productivity and profitability.¹⁹³ In 1993, Gellene earned \$1.86 million in fees for Milbank in representing the Bucyrus-Erie Company, a Wisconsin mining and construction equipment manufacturer, in corporate bankruptcy reorganization proceedings.¹⁹⁴ In 1996, Bucyrus-Erie and its creditors sought sanctions, fee disgorgement, and judicial revocation of Milbank as bankruptcy counsel for failure to disclose its concurrent representation of the major secured creditor of the company.¹⁹⁵ In 1997, a federal district court found Milbank in violation of federal bankruptcy rules; subsequently, a federal grand jury indicted Gellene on three criminal counts.¹⁹⁶ In 1998, a federal jury issued a guilty verdict on all counts, resulting in a fifteen-month sentence for Gellene.¹⁹⁷

In his appraisal of the Bucyrus-Erie case, Davis cites "structural" and "operational" flaws in Milbank's client intake and oversight system, and Gellene's individual ethical failures in assessing actual or potential conflicts of interest.¹⁹⁸ He comments that Milbank's client intake system "gave disproportionate (or, possibly, complete) authority to individual partners to make client intake decisions," evidently "did not require adequate information to be submitted for independent review prior to the commencement of work for new clients," and provided "inadequate or no independent review of client intake decisions on behalf of and on the part of the law firm."¹⁹⁹ Good risk management, Davis complains, would have "enabled" Milbank to assist Gellene "both by educating him as to the appropriate principles and rules and also as to the scale of the potentially adverse consequences that would flow from a misguided decision."²⁰⁰ Effectively managed, Davis emphasizes, such dialogue would have compelled Gellene to "collaborate with the firm in making a fully informed ethical judgment to his and the firm's advantage."²⁰¹ Significantly, he concedes that both stances—individual self-interest and institutional advantage—arise out of the "tournament culture" and "eat what you kill" compensation structure dominating the large law firm legal services

193. On the conflation of financial performance and professional values in law firm culture, see Deborah Rhode, *Profits and Professionalism*, 33 *FORDHAM URB. L.J.* 49, 49–57 (2005).

194. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1920.

195. *See id.*

196. *See id.* at 1920–21.

197. *Id.* at 1921. On conflicts of interest in organizational representation, see Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 *LAW & SOC. INQUIRY* 87 (2003); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 *CALIF. L. REV.* 57 (2003).

198. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 122 ("Experience shows that individual partners seeking to introduce business often make faulty judgments about conflict of interest issues.").

199. *Id.*

200. *Id.* at 123.

201. *Id.*

industry and Milbank's partnership ranks since the 1980s.²⁰² To that extent, he adds, both culture and compensation constitute "contributing underlying causes for [Milbank's] risk management failure."²⁰³ To ascertain whether the same management failure may infect litigation, consider discovery-related litigation risk in *Qualcomm*.

C. LITIGATION RISK: DISCOVERY

Litigation risk in discovery is highlighted by the protracted sanction proceedings in *Qualcomm*,²⁰⁴ a widely reported civil action in the U.S. District Court for the Southern District of California seeking injunctive relief and compensatory damages for patent infringement.²⁰⁵ Qualcomm initiated its federal action in 2005, alleging Broadcom's multi-count patent infringement through the manufacture and sale of H.264-compliant products.²⁰⁶ Broadcom responded that the disputed patents were unenforceable due to Qualcomm's inequitable conduct and waiver, specifically its 2002–2003 participation in the Joint Video Team (JVT), a video technology "standards-setting body that created the H.264 standard."²⁰⁷

In discovery, Broadcom sought information concerning Qualcomm's participation in the JVT via interrogatories, depositions, and document production requests.²⁰⁸ Qualcomm pledged to "produce non-privileged relevant and responsive documents describing QUALCOMM's participation in the JVT, if

202. See *id.* at 122. Davis points out that "law firm culture can operate either to enhance, or in the worst instances, effectively to disable, client intake management systems," noting that "compensation structures, such as those that reward 'eat what you kill' behavior, are likely to lead lawyers to try to undermine or avoid independent review of the decision to bring on new work." *Id.* at 101–02; see also Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087 (2008).

203. Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 122.

204. *Qualcomm Inc. v. Broadcom Corp. (Qualcomm III)*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (granting in part and denying in part defendant's motion for sanctions and sanctioning Qualcomm and six individual attorneys), *vacated in part*, No. 05cv1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (vacating order denying the self-defense exception to the attorney-client privilege and remanding only with regard to the six attorney objectors).

205. *Id.* at *1; see also *Qualcomm Inc. v. Broadcom Corp. (Qualcomm I)*, 539 F. Supp. 2d 1214, 1216 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 548 F.3d 1004 (Fed. Cir. 2008). For helpful commentary, see Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 24–29 (2009) (comments of Judge John M. Facciola); Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521 (2009); Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 MERCER L. REV. 983 (2009). See also Thomas Allman, *Detering E-Discovery Misconduct with Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 YALE L.J. POCKET PART 161, 165 (2009); William T. Gallagher, *IP Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators*, 10 J. MARSHALL REV. INTELL. PROP. L. 309 (2011).

206. *Qualcomm III*, 2008 WL 66932, at *1; *Qualcomm I*, 539 F. Supp. 2d at 1216.

207. *Qualcomm III*, 2008 WL 66932, at *1. Under the doctrine of waiver, Qualcomm's 2002–2003 participation in the Joint Video Team (JVT) H.264 standard-setting process would preclude infringement actions against companies like Broadcom. *Id.* at *3.

208. *Id.* at *2.

any, which can be located after a reasonable search” and “responsive non-privileged documents that were given to or received from [the relevant] standards-setting body.”²⁰⁹ Qualcomm insisted that it first attended a JVT meeting in December 2003 and that it submitted the first of four JVT proposals in January 2006.²¹⁰

At trial, Qualcomm denied participating in the JVT in 2002–2003. Nonetheless, in January 2007, the jury returned a unanimous verdict in favor of Broadcom finding non-infringement of the patents at issue and a unanimous advisory verdict in favor of Broadcom finding the patents unenforceable due to Qualcomm’s inequitable conduct and waiver.²¹¹ In post-trial hearings and negotiations, the Qualcomm litigation team “continued to vigorously argue no participation [in the JVT] and no foul play” and “to insist that they had conducted a reasonable search for responsive documents during discovery”²¹² By letter dated February 16, 2007, a Qualcomm attorney advised Broadcom: “[w]e continue to believe that Qualcomm performed a reasonable search of Qualcomm’s documents in response to Broadcom’s Requests for Production”²¹³

In March 2007, U.S. Senior District Judge Rudi M. Brewster found

clear and convincing evidence that Qualcomm, its employees, and its witnesses actively organized and/or participated in a plan to profit heavily by (1) wrongfully concealing the patents-in-suit while participating in the JVT and then (2) actively hiding this concealment from the Court, the jury, and opposing counsel during the present litigation.²¹⁴

Judge Brewster cited evidence of Qualcomm’s “aggravated litigation abuse” in discovery through “constant stonewalling, concealment, and repeated misrepresentations” and in trial through the repeated presentation of false witness testimony.²¹⁵ Judge Brewster also found “clear and convincing evidence that Qualcomm counsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial” proceedings.²¹⁶ Based on these findings, Judge Brewster concluded that Qualcomm waived its rights to enforce the patents in controversy.²¹⁷

209. *Id.* (quoting Qualcomm attorney’s response to discovery request).

210. *Id.*

211. *Id.* at *5.

212. *Qualcomm Inc. v. Broadcom Corp. (Qualcomm I)*, 539 F. Supp. 2d 1214, 1245–46 (S.D. Cal. 2007), *aff’d in part, vacated in part*, 548 F.3d 1004 (Fed. Cir. 2008).

213. *Id.* at 1246.

214. *Id.* at 1228.

215. *Id.* at 1227–28; *see also Qualcomm Inc. v. Broadcom Corp. (Qualcomm III)*, No. 05cv1958-B (BLM), 2008 WL 66932, at *8 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05cv1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

216. *Qualcomm I*, 539 F. Supp. 2d at 1234–35.

217. *Id.* at 1249.

In April 2007, both Qualcomm's outside counsel and General Counsel admitted in separate letters that Qualcomm had discovered "'thousands'" of unproduced, responsive electronic documents that "'appear to be inconsistent with arguments that [counsel] made at trial, and at the post-trial hearing.'"²¹⁸ Concurrent with these admissions, outside counsel apologized "'for asserting positions that [they] would not have taken had [they] known of the existence of these documents.'"²¹⁹ In December 2007, Judge Brewster awarded Broadcom \$8,568,633.24 in attorneys' fees, expert fees, and litigation costs, and \$691,351.85 in prejudgment interest for a total of \$9,259,985.09 to sanction Qualcomm's "bad faith litigation misconduct."²²⁰

Upon referral from the district court in 2007, U.S. Magistrate Judge Barbara L. Major probed Qualcomm's disputed litigation conduct, especially regarding the management of discovery.²²¹ In an initial post-trial report subsequently vacated in part, Magistrate Major characterized Qualcomm's discovery responses as "troubling," noting that its own designated deposition witnesses testified falsely about their knowledge of and involvement in the JVT, and deriding Qualcomm's company-wide failure to "search" witnesses' computers for relevant documents.²²²

On January 7, 2008, Magistrate Major granted in part and denied in part Broadcom's motion for sanctions against Qualcomm and its individual lawyers.²²³ Although later revisited and substantially revised, the Magistrate initially found that Qualcomm not only "intentionally withheld tens of thousands of documents" requested in discovery by Broadcom, but also failed to exercise "any meaningful oversight of its document production."²²⁴ The "suppressed documents," according to the Magistrate, "directly contradicted a key argument advanced by Qualcomm in pretrial motions and throughout trial and supported a defense asserted by Broadcom."²²⁵ The Magistrate also found that a total of "six attorneys assisted Qualcomm in withholding the critical documents by failing to conduct a reasonable inquiry into the adequacy of Qualcomm's document production and by ignoring warning signs, which indicated that the document search was not thorough and that Qualcomm's document production was not

218. *Id.* at 1247. By June 2007, Qualcomm had "located more than forty-six thousand documents (totaling more than three hundred thousand pages), which had been requested but not produced in discovery." *Qualcomm III*, 2008 WL 66932, at *6.

219. *Qualcomm I*, 539 F. Supp. 2d at 1248.

220. *Qualcomm Inc. v. Broadcom Corp. (Qualcomm IV)*, No. 05-CV-1958-RMB (BLM), 2007 WL 4351017, at *1 (S.D. Cal. Dec. 11, 2007). At the close of trial, Broadcom moved for sanctions against Qualcomm for its failure to produce thousands of discovery documents. *Qualcomm III*, 2008 WL 66932, at *1.

221. *Qualcomm III*, 2008 WL 66932, at *1, *9 n.5.

222. *Id.* at *3.

223. *Id.* at *20.

224. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2010 WL 1336937, at *1 (S.D. Cal. Apr. 2, 2010) (citing *Qualcomm III*, 2008 WL 66932, at *18-23).

225. *Id.* (citing *Qualcomm III*, 2008 WL 66932, at *18-23).

complete.”²²⁶ This finding pointed out “several inadequacies in Qualcomm’s document search” that in the Magistrate’s view “should have been apparent to outside counsel.”²²⁷ Three such inadequacies stand out: first, “the failure to search the computers belonging to, or used by, deponents and trial witnesses,” second, “the failure to adequately investigate when significant, relevant, and unproduced documents were discovered,” and third, “the failure to ensure there was a legitimate factual basis for the legal arguments made to the Court before making them.”²²⁸

In reliance on this earlier set of findings, Magistrate Major initially concluded that “Qualcomm intentionally withheld tens of thousands of emails” and that its litigation team “assisted, either intentionally or by virtue of acting with reckless disregard for their discovery obligations, in this discovery violation.”²²⁹ That reckless disregard, she reasoned, enabled Qualcomm’s attorneys “to repeatedly and forcefully make false statements and arguments to the court and jury” in possible violation of their ethical duties.²³⁰ Accordingly, the Magistrate referred six members of Qualcomm’s litigation team to The State Bar of California for an investigation of possible ethics rule violations and disciplinary sanctions, and ordered Qualcomm and the attorneys to participate in a comprehensive Case Review and Enforcement of Discovery Obligations (CREDO) program.²³¹

Subsequently, Qualcomm’s attorneys filed objections to the Magistrate’s sanctions order with the trial judge, U.S. District Judge Brewster.²³² On March 5, 2008, Judge Brewster vacated the Magistrate’s order specific to the objector attorneys and remanded the matter back to the Magistrate, citing the objectors’ “due process right to defend themselves” and reasoning that they “should ‘not be prevented from defending their conduct by the attorney-client privilege of Qualcomm and its employees and representatives because of the application of the self-defense exception to the attorney-client privilege of Qualcomm.’”²³³

226. *Id.* (citing *Qualcomm III*, 2008 WL 66932, at *23-31).

227. *Id.* (citing *Qualcomm III*, 2008 WL 66932, at *23-31).

228. *Id.* (citing *Qualcomm III*, 2008 WL 66932, at *23-31) (commenting that Qualcomm did not appeal its \$8.5 million sanction order).

229. *Qualcomm III*, 2008 WL 66932, at *17-18 (“[T]he Sanctioned Attorneys assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm’s document search was inadequate, and blindly accepting Qualcomm’s unsupported assurances that its document search was adequate.”).

230. *Id.* at *18.

231. *Id.* at *18-19.

232. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2010 WL 1336937, at *1 (S.D. Cal. Apr. 2, 2010).

233. *Id.* (quoting U.S. District Judge Brewster). For a discussion of the ethical underpinnings of the self-defense exception and its rationale, see Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998); Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 758 (1988). See also Jennifer Cunningham, Note, *Eliminating “Backdoor” Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992, 992-93 (1990).

Thereafter, Magistrate Major afforded the objector attorneys “an almost unlimited opportunity to conduct discovery and to present new facts to the Court.”²³⁴ During the next fifteen months, the parties to the litigation engaged in “a massive discovery effort.”²³⁵ In total, Qualcomm “produced approximately 22,500 documents” extending “well over 100,000 pages” of discovery.²³⁶ Additionally, during the remand proceedings, the objector attorneys “deposed seven Qualcomm engineers, three of Qualcomm’s in-house attorneys, two of Qualcomm’s in-house paralegals,” and one of the sanctioned attorneys.²³⁷ Taken together, these efforts culminated in a three-day evidentiary hearing featuring the submitted documents, expert opinions, lengthy attorney declarations, and extensive legal arguments.²³⁸

On April 2, 2010, Magistrate Major issued an order declining to impose sanctions against the six objector attorneys.²³⁹ In declining sanctions and dissolving the court’s order to show cause, Magistrate Major expressed “no doubt” that the “massive discovery failure” at issue “resulted from significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm employees.”²⁴⁰ The Magistrate explained that “new facts and evidence presented . . . during the remand proceedings revealed ineffective and problematic interactions between Qualcomm employees and most of the [objector] Attorneys during the pretrial litigation, including the commission of a number of critical errors.”²⁴¹ At the same time, the Magistrate emphasized that such facts and evidence “also revealed that the [objector] Attorneys made significant efforts to comply with their discovery obligations.”²⁴² In light of those efforts, the Magistrate declined to sanction any of the objector attorneys.²⁴³

From Davis’s prescriptive standpoint, the litigation risks at stake in the *Qualcomm* discovery process may be attributable to structural and operational flaws in law firm litigation oversight and discovery management systems, and perhaps to individual lawyer failures in assessing actual or potential document relevance.²⁴⁴ In the *Qualcomm* case as in the *Gellene* Bucyrus-Erie bankruptcy

234. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2010 WL 1336937, at *1 (S.D. Cal. Apr. 2, 2010).

235. *Id.* Reportedly “Qualcomm searched for, uploaded to its internal review database, and had its outside counsel review for responsiveness and privilege, over 1.6 million documents.” *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at *1-2.

239. *Id.* at *7.

240. *Id.* at *2.

241. *Id.*

242. *Id.*

243. *Id.*

244. See generally Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773 (1998).

restructuring, internal law firm management systems may have given disproportionate authority to individual associates, paralegals, or partners to make discovery production decisions without adequate information and independent review. No doubt good risk management, as conceived by Davis, would have enabled the *Qualcomm* law firms to better assist their individual associates, paralegals, and partners by educating them as to the appropriate rules of discovery and also as to the potentially adverse consequences that would flow from a misguided discovery decision. When effectively managed, as gauged by Davis, such dialogue would have encouraged or even compelled the individual *Qualcomm* lawyers to collaborate with their law firms in making fully informed and ethical discovery judgments. For Davis, those judgments by design would redound to the individual and collective advantage of the lawyers and law firms involved in the *Qualcomm* case.

In spite of these persuasive judgments, Davis's reliance on individual self-interest and institutional advantage claims, either for the purpose of exhortation or incentive, perilously echoes the "tournament culture" and "eat what you kill" ethos dominating the large law firm legal services industry. His acknowledgement that such an ethos may cause or contribute to law firm risk management failure suggests that such self-serving reliance may be misplaced. For Davis, to his credit, good risk management goes beyond technical application or strict compliance with the legalities of the ethics rules to incorporate the interests of the public, of clients, and of the spirit of the law. On this broad measure, the systemic purpose of risk management is to enhance the quality of ethical decision-making by individual lawyers and law firms. The next Part considers the enhancement of risk management systems by incorporation of classical, discretionary, regulatory, and diversity norms in law firm governance, especially in the evaluation of exclusion and inclusion risks in the partner and associate hiring, promotion, and retention process.

IV. RISK GOVERNANCE ETHICS

Risk governance ethics link large law firm tournament-directed risk management policies to classical, discretionary, regulatory, and diversity traditions of professionalism. This linkage binds risk assessment and regulation to lawyer moral discretion and public obligation. Fuller integration of moral and public precepts into the prescribed risk-based routines of internal controls, external audits, conflicts of interest protocols, continuing legal education training, and entry-level and lateral employment enables lawyers and law firms to better understand the burdens of moral agency, the duties of social responsibility, and the higher ambitions of professional independence, service, and trust.

A. CLASSICAL NORMS

Historically, classical norms of fraternity and civic spirit informed the culture and sociology of large law firm corporate practice. The ideals defined lawyer character and conduct in terms of wisdom, prudence, and craft-like virtuosity, and celebrated lawyer public leadership and law firm civic-mindedness. The individual and institutional misconduct of Gellene and Milbank, and to a lesser extent the conduct in *Kelley Drye* and perhaps *Qualcomm*, offend the classical norms of professionalism espoused by leading academics in legal education and ethics, notably Anthony Kronman, Robert Cover, and Tom Shaffer. Kronman's vision of classical norms urges the public virtue and wisdom of the lawyer-statesman acting within the traditions of the prevailing legal order.²⁴⁵ Cover's vision of normative diversity and dialogue embraces the voices of outsider ethical communities silenced by the traditions of the dominant legal order.²⁴⁶ Shaffer's vision of faith and community-affirming spirituality encourages moral dialogue subversive of the dominant order and its traditions.²⁴⁷

Kronman's classical vision of the lawyer-statesman invokes a sense of civic trusteeship in the custodial work of conserving past professional ideals.²⁴⁸ That craft-like work cultivates a quality of lawyer judgment embodied in technical virtuosity and manifested in practical wisdom and prudence.²⁴⁹ Craft-like activity, for example, in transactions, discovery, or firm governance, infuses professional life with personal meaning and connotes a special talent for leadership that coincides with the public good.²⁵⁰ Kronman's classical lawyers possess a superior ability to discern the public good and to preserve law and community. Their integrity and fraternity, expressed in the arts of compassion, affectionate good will, and civic friendship, interweave the means-ends calculations of client representation with larger prudential considerations and other-regarding interests of the law and the legal order.²⁵¹ Common law traditions of prudentialism and craft in the service of the public good restore the role of the lawyer as a moral agent called to the law as a profession and renews the moral capacity for the ends-oriented judgments of third party and public deliberation.²⁵²

245. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

246. See Cover, *supra* note 75, at 4-44.

247. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1932-33. See generally Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229 (1999).

248. See KRONMAN, *supra* note 245, at 11-17.

249. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1927; see KRONMAN, *supra* note 245, at 15-16.

250. See KRONMAN, *supra* note 245, at 14-15.

251. See *id.* at 99-100.

252. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1927-30. See generally KRONMAN, *supra* note 245, at 14-17.

Cover echoes Kronman's classical valuation of the profession as a civic calling with intrinsic rewards and satisfactions, as well as his treatment of legal ethics as a reservoir of group or community norms.²⁵³ Yet, for Cover, ethics rules stem from moral community, not simply the laws and customs of a prevailing legal order. That community or *nomos* reflects the tension between the reality of a dominant normative order and a competing vision of diverse ethical commitments and contested narratives.²⁵⁴ Cover's preference for normative diffusion and dialogue permits polycentric norms of moral diversity to thrive.²⁵⁵

Shaffer connects Cover's vision of community-based norm articulation and moral aspiration to justice and religious faith.²⁵⁶ Shaffer views religious norms as a source of moral responsibility and spirituality realized in relation to others and in engagement with community. Responsive moral community "entails both self-alteration and context-transcendence" in relationships of communion that value others outside the client-lawyer relationship.²⁵⁷ To reconcile client individual rights and lawyer social responsibilities, Shaffer joins Kronman in imagining lawyers as custodians of community, compassion, and conscience in dialogue with clients about the common good, a dialogue absent from the instant case studies.²⁵⁸

Classical norms of the common good inform discovery and the assessment of litigation risk. In discovery, the common good is bound up in the notion of candor in communication with clients, courts, and adversaries. Consider in this respect Magistrate Major's ultimate decision to decline attorney sanctions in the *Qualcomm* litigation and the underlined importance of managing communication risk in discovery. Indeed, the Magistrate's decision usefully summarized "the major errors" in lawyer-client communication "contributing to the massive cache of critical documents remaining undiscovered by [the objector] Attorneys and unproduced by Qualcomm until after trial."²⁵⁹ For the Magistrate, the "fundamental problem" in the *Qualcomm* litigation "was an incredible breakdown in communication."²⁶⁰

253. See generally Cover, *supra* note 75.

254. See *id.* at 9.

255. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1932. See generally Cover, *supra* note 75.

256. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1932–33. See generally Shaffer, *supra* note 247.

257. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1932–33.

258. See *id.* at 33; see also Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001).

259. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).

260. *Id.*

In findings of fact, Magistrate Major observed that a “lack of meaningful communication permeated all of the relationships (amongst Qualcomm employees . . . between Qualcomm employees and outside legal counsel, and amongst outside counsel) and contributed to all of the other failures.”²⁶¹ For example, no evidence was adduced “establishing that either in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection.”²⁶² Equally important, Magistrate Major explained, “no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted . . . and that the resulting discovery supported the important legal arguments, claims, and defenses being presented to the court.”²⁶³

To Magistrate Major, repeated “fundamental failures” in communication “led to the discovery violations” in the *Qualcomm* litigation.²⁶⁴ Even more troubling for risk management purposes, the Magistrate found that the “failures were exacerbated by an incredible lack of candor on the part of the principal Qualcomm employees.”²⁶⁵ Magistrate Major opined that “this lack of candor was not limited to . . . just the Qualcomm engineers.”²⁶⁶ Such widespread lack of candor persisted despite the objector attorneys’ continual attempts “to determine whether Qualcomm had participated in the JVT proceedings during the time the H.264 standard was being developed,”²⁶⁷ and despite their recurring questioning

261. *Id.*

262. *Id.* The Magistrate noted:

[O]utside counsel did not obtain sufficient information from any source to understand how Qualcomm’s computer system is organized: where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, what records are maintained regarding the search for, and collection of, documents for litigation, etc.

Id.

263. *Id.* at *2-3 (noting “a lack of agreement amongst the participants regarding responsibility for document collection and production”).

264. *Id.* at *2. Magistrate Major pointed to both communication and related delegation errors committed by the litigation team, in-house lawyers, and paralegals in promulgating and implementing collection guidelines regulating database and computer searches, including potential search locations and custodians. *Id.* at *3 (citations omitted).

265. *Id.* at *4.

266. *Id.* (commenting that “a number of Qualcomm employees, including legal counsel, knew that Qualcomm had analyzed the H.264 standard and had attended JVT meetings during the relevant time period and yet no one informed Responding Attorneys”).

267. *Id.* (noting that the sanctioned attorneys “received confirmation by fifteen Qualcomm employees, including lawyers, on thirty-one occasions that Qualcomm did not participate in JVT or that the same was probably or almost certainly correct”).

of “Qualcomm employees about Qualcomm’s alleged participation.”²⁶⁸

The consequences of this “pervasive miscommunication and incomplete document search,” Magistrate Major declared, “were compounded by an inadequate follow-up in response to contradictory, or potentially contradictory evidence.”²⁶⁹ The Magistrate remarked, for example, “neither in-house nor outside counsel ensured that the identified employees’ computers were searched for relevant documents and emails.”²⁷⁰ Absent supervisory follow-up, she added, “when the twenty-one emails were found on [a] computer during trial, none of the attorneys considered the fact that the discovery of the ‘new’ emails proved Qualcomm’s document collection and production had been inadequate,” or “reviewed the discovery production log to determine the scope of the document collection and production, or otherwise reflected on the state of the discovery or its application to trial arguments.”²⁷¹ As a result, Magistrate Major found, “some of the interrogatory responses were not accurate and the document productions were not complete,” even though the “discovery responses were made after a reasonable, although flawed, inquiry and were not without substantial justification.”²⁷²

Magistrate Major’s findings clarify that the objector attorneys “did not act in bad faith” in spite of “a number of poor decisions.”²⁷³ These findings demonstrate that the objector attorneys “did make repeated efforts to verify that Qualcomm’s discovery responses were accurate,” even if they “did not pursue several discovery paths that seem obvious, at least in hindsight.”²⁷⁴ Likewise, the findings show “numerous, reasonable steps to verify the truth of [witness] statements.”²⁷⁵ The findings also establish that the objector attorneys “themselves acknowledge that it was a mistake” in judgment “not to produce the twenty-one emails discovered during trial.”²⁷⁶

Despite these elucidating findings, Magistrate Major pointed out that “no one suggested that any follow-up discovery investigation be conducted.”²⁷⁷ Furthermore, the Magistrate added, “none of the attorneys considered how the ‘new’ [email] documents affected the arguments being presented during trial.”²⁷⁸ To the extent that the objector attorneys “should have considered the contents of the

268. *Id.* (mentioning that “five third-parties, including the chair of the JVT and a Broadcom employee involved in the JVT proceedings, confirmed their belief that Qualcomm was not involved with JVT during development of the H.264 standard”).

269. *Id.* at *5.

270. *Id.*

271. *Id.*

272. *Id.* at *6.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at *7 (citations omitted).

277. *Id.*

278. *Id.*

documents and their relevance to the arguments being presented in court and to the adequacy of the discovery process,” nevertheless, she found that their decision “to withhold the twenty-one emails as non-responsive was not made in bad faith.”²⁷⁹ Hence, Magistrate Major concluded that while “some” of the objector attorneys made “significant errors,” the remand proceedings produced “insufficient evidence to prove that any of the [objector] Attorneys engaged in the requisite ‘bad faith’ or that [any one of the objector attorneys] failed to make a reasonable inquiry before certifying Qualcomm’s discovery responses.”²⁸⁰ For these reasons, the Magistrate declined to impose sanctions on the objector attorneys and dissolved the order to show cause that initiated the court’s sanction proceedings.²⁸¹

The *Qualcomm* sanction proceedings well illustrate the individual lawyer, institutional law firm, and in-house corporate challenges of managing communication risk in complex litigation-related discovery. That risk increases when an individual lawyer or paralegal on a litigation team decides *not* to produce a relevant, non-privileged document and *not* to notify an appropriate law firm or in-house supervisor of his decision, whether the decision ultimately proves to be right or wrong. In the same way, that risk increases when a litigation team as a whole loses sight of “the larger discovery picture” in a case.²⁸²

The structure of deniability in large law firm organizations screens individuals—partners, associates, and paralegals—from liability for ethical misdeeds when they act at a distance and when they act under imperfect information. The ability to avoid acknowledging affirmative screening actions and unwitting misdeeds protects lawyers from unwanted knowledge, for example, of discovery errors or omissions. Recall that for Luban, ignorance obtained from wrongfully screening against guilty knowledge is itself blameworthy. On this valence, both the wrongful screening action and the unwitting misdeed share blame, implying a principal-agent complicity when the lawyer-as-agent ratifies the screening decision of the lawyer-as-principal to avoid guilty knowledge.

To Luban and others, law firm complicity in ethical misconduct arises out of willful institutional ignorance of inconvenient knowledge and a related lack of candor among individual partners and associates. As before, both forms of ethical opacity raise issues of integrity and dissonance for individual lawyers, their law firms, and the clients they purport to serve in litigation advocacy and transactional counseling. They also signal the absence of moral leadership inside and outside the law firm itself.²⁸³ As the *Qualcomm* case study shows, the individual

279. *Id.*

280. *Id.*

281. *See id.*

282. *Id.*

283. On lawyers and moral leadership, see Deborah L. Rhode, *Lawyers and Leadership*, 20 PROF. LAW, 1, 1 (2010) (citing the “leadership deficit” in the legal profession); Deborah L. Rhode, *Where is the Leadership in*

and institutional failure to address such issues, in this case the management of communication risk in discovery, shifts investigation and resolution to courts, however functionally ill-equipped and normatively unsuited they may be for that managerial task. Turn next to an assessment of discretionary and regulatory norms.

B. DISCRETIONARY AND REGULATORY NORMS

Discretionary norms seek to enhance lawyer accountability by relying on the resources of the law itself—legality and justice. Simon's carefully elaborated justice-seeking version of discretion in lawyering tailors purposive and practical judgments to refuse legally permissible courses of action and to rebuff potentially enforceable legal claims.²⁸⁴ Such judgments turn on an assessment of relative merit internal and external to the representation. Simon links reconciliation of competing client and third-party goals to the traditional ambition of the lawyering process defined by direct lawyer participation in not only the elaboration, but also the implementation, of legality and justice.²⁸⁵ Participation requires independence from client goals and established laws sufficient to vindicate legal merit and justice in a particular case.²⁸⁶

Discretion confers direct responsibility on the lawyer for both substantive merit and procedural form. The purpose and form of procedure molds the broad and narrow framing of an issue—for example, conflicts of interest, discovery disclosure, or law firm diversity—consistent with interpretive plausibility and good faith.²⁸⁷ Gellene's lack of good faith in the Bucyrus-Erie bankruptcy, coupled with his weak commitment to the norms of legality and justice, undercut the legitimacy of his discretionary judgments of internal merit and goal selection in bankruptcy counseling and litigation, and hence, breached his deliberative and fiduciary duties.²⁸⁸ The misjudgments, here "induced by tournament competition, corporate practice insularity, and transactional team allegiance," warrant consideration of compliance-enforcing regulatory norms.²⁸⁹

Regulatory norms based on compliance-enforcing procedures may be inte-

Moral Leadership?, in *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* 4 (Deborah L. Rhode ed., 2006) (discussing leadership, inspiration, and relationships). See generally Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. POCKET PART 266 (2007); HERB RUBENSTEIN, *LEADERSHIP FOR LAWYERS* (2000).

284. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1940–41.

285. *Id.* at 1941. See generally William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067 (2007).

286. See Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1940–41; Simon, *Ethical Discretion in Lawyering*, *supra* note 285, at 1090–113. See generally Whelan, *supra* note 285.

287. See Simon, *Ethical Discretion in Lawyering*, *supra* note 285, at 1096–113.

288. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1942.

289. *Id.* at 1944 (citing REGAN, *supra* note 6, at 37–41, 298).

grated into the infrastructure of law firm organization, as Davis shows, chiefly through the appointment of full-time in-house ethics advisers, the designation of in-house partner liaisons to consult with firm malpractice insurance carriers, and the implementation of interactive ethics training programs for lawyers and administrative staff. To be effective, again as Davis prescribes, these programs and procedures must inculcate an organization-wide culture of compliance with attendant organizational leadership. All require institutional resources, open communication and access to information, independent auditors, supervision and monitoring, and compensation-compliance linkage.²⁹⁰

Regan ties compliance-enforcing procedures and organizational values-accountability to corporate enterprises and corporate law firms committed to the internal regulation of specialized practice groups and teams.²⁹¹ For Regan and to a substantial extent Davis, such regulation vests responsibility for compliance measures in entities or industries themselves within targeted fields of technical expertise.²⁹² More specifically, it confers responsibility upon specialists working in cooperation with a firm-designated practice group ethics partner or a firm-wide ethics committee in joint assessment, deliberation, and implementation.²⁹³ Such discretionary and regulatory norms work to revive the traditional ambitions of legality and justice in professionalism.

Both discretionary and regulatory norms prove useful in governing discovery obligations. Consider, for example, Judge Major's now vacated 2008 order directing Qualcomm and its attorneys to participate in a comprehensive Case Review and Enforcement of Discovery Obligations program for instructive lessons in managing discovery obligations.²⁹⁴ In particular, Judge Major's referral to the CREDO program links the larger legal services marketplace "decline in and deterioration of civility, professionalism and ethical conduct" in complex litigation to Davis's process-oriented risk management compliance paradigm.²⁹⁵ Specific to mixed ethical and discovery obligations, the CREDO program protocol adopts compliance-enforcing mechanisms common to Davis's regulatory scheme. Consider the following cluster of shared commonalities.

290. *See id.* at 1947–48.

291. *See* REGAN, *supra* note 6, at 358–61.

292. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1949. *See generally* REGAN, *supra* note 6, at 358–66; David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465 (1996); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

293. Alfieri, *The Fall of Legal Ethics*, *supra* note 5, at 1949.

294. *See* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2010 WL 1336937, at *7 n.13 (S.D. Cal. Apr. 2, 2010) (noting that the remand proceedings served the intended function of the CREDO program referral in the original sanction order).

295. Qualcomm Inc. v. Broadcom Corp. (*Qualcomm III*), No. 05cv1958-B (BLM), 2008 WL 66932, at *20 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05cv1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

The CREDO program requires “identifying the factors that contributed to the discovery violation,” for example, insufficient communication, inadequate case management, and inadequate discovery plans.²⁹⁶ Davis’s risk management protocol emphasizes lawyer-to-lawyer, lawyer-to-firm, and lawyer-to-client communication, case docket and calendar supervision, and internal oversight.²⁹⁷ The CREDO program also entails “creating and evaluating proposals, procedures, and processes that will correct the deficiencies identified in” case management.²⁹⁸ Davis’s protocol implements similar internal controls. So, too, the CREDO program involves “developing and finalizing a comprehensive protocol that will prevent future discovery violations.”²⁹⁹ Davis’s protocol stresses loss prevention. Furthermore, the CREDO program extends the application of discovery protocol broadly to multiple factual situations, for example, “when the client does not have corporate counsel, when the client has a single in-house lawyer, when the client has a large legal staff, and when there are two law firms representing one client.”³⁰⁰ Davis’s protocol exhibits the same elasticity. Lastly, the CREDO program necessitates “identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents (e.g., the correct databases, archives, etc.).”³⁰¹ Davis’s protocol employs technology management systems and procedures for calendars, dockets, document destruction and retention, and discovery.³⁰²

In addition to the common risk management functions of communication, internal control, loss prevention, flexibility, and tracking, both the CREDO program and Davis’s compliance paradigm demand good faith. By intent, the Federal Rules of Civil Procedure require parties to conduct discovery in good

296. *Id.* at *19 (footnote omitted).

297. See Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 101–02, 105, 115; DAVIS & JARVIS, *supra* note 24, at 15–20.

298. *Qualcomm III*, 2008 WL 66932, at *19.

299. *Id.* The CREDO comprehensive protocol dictates:

determining the depth and breadth of case management and discovery plans that should be adopted; identifying by experience or authority the attorney from the retained counsel’s office who should interface with the corporate counsel and on which issues; describing the frequency the attorneys should meet and whether other individuals should participate in the communications; identifying who should participate in the development of the case management and discovery plans; describing and evaluating various methods of resolving conflicts and disputes between the client and retained counsel, especially relating to the adequacy of discovery searches; describing the type, nature, frequency, and participants in case management and discovery meetings; and, suggesting required ethical and discovery training; etc.

Id.

300. *Id.*

301. *Id.*

302. See Davis, *Legal Ethics and Risk Management*, *supra* note 11, at 105; DAVIS & JARVIS, *supra* note 24, at 16.

faith.³⁰³ In the electronic age, Judge Major in *Qualcomm* from the outset reported, the operation of a good faith discovery system compels attorneys and clients to “work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.”³⁰⁴ Under the Federal Rules of Civil Procedure, she remarked, “[a]ttorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.”³⁰⁵ That responsibility requires individual attorney and collective law firm management accountability.

Like the conduct of Gellene and Milbank in the Bucyrus-Erie bankruptcy and the de-equitization policy in the *Kelley Drye* suit, the discovery process in the *Qualcomm* litigation shows the inadequacy of Davis’s risk management paradigm, particularly when applied to internal law firm and external lawyer-client communication and collaboration. No legal services management paradigm, of course, will fully restrain rogue partners like John Gellene, tournament-based compensation systems, or litigation teams locked in adversarial combat, especially when litigation clients turn hostile and untrustworthy. And no management paradigm will fully exert command and control over complex discovery. Also no paradigm will rescue institutions riven by tournament competition over profits and productivity.

To check the aggressive advocacy of modern corporate litigation, lawyers, law firms, and courts must go beyond risk management paradigms and CREDO programs to reinvigorate the classical norms of fraternity and civic spirit that once informed the culture and sociology of large law firm practice. Those classical norms guided lawyer character and conduct by the lights of wisdom, prudence, and craft-like virtuosity, and honored lawyer public leadership and law firm civic-mindedness in action. Espoused variously by Kronman, Cover, and Shaffer, the norms celebrated public virtue and moral dialogue inside and outside the traditions of the legal order. Such traditions—civic trusteeship, technical virtuosity, practical wisdom, prudence, and integrity—affirm the lawyer’s role as a moral agent and his capacity to engage in moral judgment that transcends private self-interest and institutional advantage. Consider next the content of diversity norms and the form of exclusion/inclusion risks in law firm workplace management.

303. See FED. R. CIV. P. 26(g) advisory committee’s note (1983 Amendment) (“If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.”), available at <http://www.law.cornell.edu/rules/frcp/ACRule26.htm>.

304. *Qualcomm III*, 2008 WL 66932, at *9–10 (“Qualcomm has not presented any evidence attempting to explain or justify its failure to produce the documents.” (emphasis in original)).

305. *Id.* at *9.

C. DIVERSITY NORMS AND EXCLUSION/INCLUSION RISKS

Davis's linkage of compliance norms to private self-interest and law firm profitability imperatives, and his capacious model of risk regulation, together permit the treatment of diversity as a structural and nonstructural risk factor in the governance of large law firms. Appropriate to its breadth and its variation across race,³⁰⁶ gender,³⁰⁷ age,³⁰⁸ and disability,³⁰⁹ the regulation of workplace diversity generates a wide range of management paradigms,³¹⁰ practices,³¹¹ and performance effects.³¹² Both the economic determinants of diversity³¹³ and its complex organizational setting³¹⁴ spur overt and covert workplace resistance.³¹⁵ Overcoming workplace resistance in large law firms or in other institutional contexts, for example, in higher education,³¹⁶ requires a climate or culture of diversity as well as a character-based ethos of diversity.³¹⁷ The identification and assessment of exclusion and inclusion risks in the workplace of the modern multistate and multinational law firm shape the cultural climate and institutional character of diversity, including its normative underpinnings.

306. See generally David A. Thomas & Suzy Wetlauffer, *A Question of Color: A Debate on Race in the U.S. Workplace*, HARV. BUS. REV., Sept.-Oct. 1997, at 118.

307. See generally Claude Francoeur et al., *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83 (2008); Joan Magretta, *Will She Fit In?*, HARV. BUS. REV., Mar.-Apr. 1997, at 18.

308. See generally Jerry W. Hedge, Walter C. Borman, & Steven E. Lammlein, *Organizational Strategies for Attracting, Utilizing, and Retaining Older Workers*, in JERRY W. HEDGE, WALTER C. BORMAN & STEVEN E. LAMMLEIN, *THE AGING WORKFORCE: REALITIES, MYTHS, AND IMPLICATIONS FOR ORGANIZATIONS* 115-35 (2006).

309. See generally Fredrick Muyia Nafukho et al., *Disability as a Diversity Factor: Implications for Human Resource Practices*, 12 ADVANCES DEVELOPING HUM. RESOURCES 395 (2010), available at <http://adh.sagepub.com/content/12/4/395>.

310. See generally Marlene Morrison et al., *Diversity and Diversity Management: Messages from Recent Research*, 34 EDUC. MGMT. ADMIN. & LEADERSHIP 277 (2006), available at <http://ema.sagepub.com/content/34/3/277>; David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79.

311. See generally Yang Yang & Alison M. Konrad, *Understanding Diversity Management Practices: Implications of Institutional Theory and Resource-Based Theory*, 36 GROUP & ORG. MGMT. 6 (2011).

312. See generally Nigel Bassett-Jones, *The Paradox of Diversity Management, Creativity and Innovation*, 14 CREATIVITY & INNOVATION MGMT. 169 (2005), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8691.00337.x/pdf>; Mary Kwak, *The Paradoxical Effects of Diversity*, 44 MIT SLOAN MGMT. REV. 7 (2003).

313. See generally Vera Djordjevich, *Law Firms' Diversity Progress Stalls in Recession*, NAT'L L. REV. (Oct. 14, 2010), <http://www.natlawreview.com/article/law-firm-diversity-progress-stalls-recession>; O'Kelly E. McWilliams III & Nimesh M. Patel, *Diversity Management in An Economic Downturn*, BUS. L. TODAY, Jan.-Feb. 2009, at 59-61, available at <http://apps.americanbar.org/buslaw/blt/2009-01-02/mcwilliams.shtml>.

314. See generally Lynn M. Shore et al., *Diversity in Organizations: Where Are We Now and Where Are We Going?*, 19 HUM. RESOURCE MGMT. REV. 117 (2009).

315. See generally Kecia M. Thomas & Victoria C. Plaut, *The Many Faces of Diversity Resistance in the Workplace*, in DIVERSITY RESISTANCE IN ORGANIZATIONS 1, 1-22 (Kecia M. Thomas ed., 2008).

316. See William G. Bowen et al., *A Report Card on Diversity: Lessons for Business from Higher Education*, HARV. BUS. REV., Jan.-Feb. 1999, at 139.

317. See Andrew O. Herdman & Amy McMillan-Capehart, *Establishing a Diversity Program Is Not Enough: Exploring the Determinants of Diversity Climate*, 25 J. BUS. & PSYCHOL. 39 (2010).

1. DIVERSITY NORMS

Diversity norms encompass multiple categories of identity-based differences spanning gender,³¹⁸ race and ethnicity,³¹⁹ and other varied cultural differences.³²⁰ Adapted to the dictates of Big Law firm management,³²¹ the norms necessarily skew toward marketplace performance³²² in a global economy.³²³ Yet, they also acknowledge the complex psychology of diversity management³²⁴ and the cross-cultural dynamics of intergroup conflict.³²⁵ Moreover, they concede the management limits of diversity training, pipeline and outreach programs, and network and affinity groups for women and minorities in the legal profession.³²⁶ The acknowledgement of diversity management limits and the admission that standard leadership and outreach may prove insufficient to promote equal opportunity, equity, and diversity effectively causes many scholars of the legal profession, here Deborah Rhode³²⁷ and Eli Wald,³²⁸ to endorse diversity initiatives that combine both conventional (mentoring programs) and innovative (oversight structures) strategies of law firm accountability, monitoring, and information sharing. For Rhode and others,³²⁹ these strategies of organizational management must be founded on a firm-wide culture of commitment and

318. See generally Deborah L. Rhode, *The Difference "Difference" Makes*, in THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 3-50 (Deborah L. Rhode ed., 2003); Patricia H. Werhane et al., *Women Leaders in Corporate America: A Study of Leadership Values and Methods*, in 1 GENDER, RACE, AND ETHNICITY IN THE WORKPLACE 1-29 (Margaret F. Karsten ed., 2006).

319. See generally NILDA CHONG & FRANCIA BAEZ, *LATINO CULTURE: A DYNAMIC FORCE IN THE CHANGING AMERICAN WORKPLACE* (2005); Elizabeth H. Gorman & Fiona M. Kay, *Racial and Ethnic Minority Representation in Large U.S. Law Firms*, in STUDIES IN LAW, *supra* note 76, at 211, 232-35.

320. See generally Taylor Cox, Jr., *CREATING THE MULTICULTURAL ORGANIZATION: A STRATEGY FOR CAPTURING THE POWER OF DIVERSITY* (2001); GEORGE HENDERSON, *CULTURAL DIVERSITY IN THE WORKPLACE: ISSUES AND STRATEGIES* (1994); JACK SCARBOROUGH, *THE ORIGINS OF CULTURAL DIFFERENCES AND THEIR IMPACT ON MANAGEMENT* (1998).

321. See generally HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY (2001).

322. See Kevin Campbell & Antonio Mínguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008).

323. See generally CELIA DE ANCA & ANTONIO VAZQUEZ, *MANAGING DIVERSITY IN THE GLOBAL ORGANIZATION: CREATING NEW BUSINESS VALUES* (2007); David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J. L. REFORM 415 (2000).

324. See generally THE PSYCHOLOGY AND MANAGEMENT OF WORKPLACE DIVERSITY (Margaret S. Stockdale & Faye J. Crosby eds., 2004).

325. See generally ELLA L. J. EDMONDSON BELL & STELLA M. NKOMO, *OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* (2001); JOSEPH W. WEISS, *ORGANIZATIONAL BEHAVIOR AND CHANGE: MANAGING DIVERSITY, CROSS-CULTURAL DYNAMICS, AND ETHICS* (2001); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001).

326. See generally Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1069-72.

327. See *id.* at 1071-75.

328. See Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1115-18 (2011).

329. See David A. Thomas, *Diversity as Strategy*, HARV. BUS. REV., Sept. 2004, at 98.

likewise sustained by a shared character of inclusion.³³⁰ To the extent that law firms' risk management strategies explicitly or implicitly gauge exclusion and inclusion risks in their organizational governance of diversity independent of culture and character, however, equal opportunity and equity will be jeopardized. Consider the assessment of exclusion risks in diversity management.

2. EXCLUSION RISKS

Exclusion risks constitute important structural and nonstructural variables in Big Law workplace diversity. Structural risk management mechanisms, for example, recruitment and mentoring committees, seek to control those variables through procedures regulating hiring, promotion, and retention. Nonstructural deep governance norms, for example, equal opportunity commitments, seek to channel those same variables through the construction of law firm character and culture. Six exclusion risks stand out in modern law firm employment practices: labor pool contraction, social capital erosion, revenue loss, institutional succession disruption, human capital attrition, and litigation or settlement cost.

The first exclusion risk concerns labor pool contraction. Law firm labor pools fill from entry-level and lateral migration streams. Exclusion, by narrowing or obstructing those eligibility streams, restricts the diversity of the available labor pool for entry-level and lateral recruitment.³³¹

A second exclusion risk involves social capital erosion. Social capital in law and legal systems accrues from bar, bench, and related civic or community sources. Exclusion relinquishes social capital, whether defined in terms of gender diversity³³² or racial integration,³³³ and surrenders the bar and bench leadership that accompanies it.³³⁴

A third exclusion risk concerns revenue loss.³³⁵ Revenue depends on firm performance,³³⁶ or more specifically team performance,³³⁷ and market competi-

330. See Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1076-77.

331. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996); see also Note, "Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination", 121 HARV. L. REV. 2156, 2177 (2008).

332. See generally Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2009).

333. See generally Wilkins, *From "Separate Is Inherently Unequal"*, *supra* note 157, at 1554 n.34 (noting "significant differences between the experiences of, and opportunities available to, black, Asian, and Hispanic lawyers—and between each of these groups and the situation confronted by white women").

334. See Jacky Lumby, *Conceptualizing Diversity and Leadership: Evidence from 10 Cases*, 34 EDUC. MGMT. ADMIN. & LEADERSHIP 151 (2006), available at <http://ema.sagepub.com/content/34/2/151>.

335. For a skeptical account of the business case for diversity, see Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1060-64.

336. See generally Sean Dwyer et al., *Gender Diversity in Management and Firm Performance: The Influence of Growth Orientation and Organizational Culture*, 56 J. BUS. RES. 1009 (2003); Luis R.

tion.³³⁸ Exclusion carries performance costs³³⁹ and produces skill deficiencies,³⁴⁰ in spite of intra-group or inter-group workplace conflict.³⁴¹ Revenue losses and performance costs rise when firms fail to satisfy the diversity mandates of corporations or the integration demands of client management teams.³⁴²

A fourth exclusion risk pertains to institutional succession disruption. Institutional succession involves leadership development,³⁴³ the cultivation of “organizational citizenship,”³⁴⁴ and forward-looking, sequential planning.³⁴⁵ Firm longevity and profitability hinge on such strategic planning. Exclusion curtails leadership options and inhibits succession planning, thus endangering firm longevity.

A fifth exclusion risk relates to human capital attrition and replacement cost. Law firm human capital is bound up in organizational culture,³⁴⁶ commitment,³⁴⁷ and key competencies.³⁴⁸ Replacement cost is measured by the dual expense of

Gómez-Mejía & Leslie E. Palich, *Cultural Diversity and the Performance of Multinational Firms*, 28 J. INT'L BUS. STUD. 309 (1997); Orlando C. Richard et al., *Cultural Diversity in Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions*, 47 ACAD. MGMT. J. 255 (2004); Orlando C. Richard, *Racial Diversity, Business Strategy, and Firm Performance: A Resource-Based View*, 43 ACAD. MGMT. J. 164 (2000) [hereinafter Richard, *Racial Diversity*]; Quinetta M. Roberson & Hyeon Jeong Park, *Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity*, 32 GROUP & ORG. MGMT. 548 (2007).

337. See generally Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, 8 COMPETITIVENESS REV., no. 2, 1998 at 32.

338. See generally Donald C. Hambrick et al., *The Influence of Top Management Team Heterogeneity on Firms' Competitive Moves*, 41 ADMIN. SCI. Q. 659 (1996).

339. See generally Richard, *Racial Diversity*, *supra* note 336; Orlando C. Richard et al., *The Impact of Racial Diversity on Intermediate and Long-Term Performance: The Moderating Role of Environmental Context*, 28 STRATEGIC MGMT. J. 1213 (2007); Marie-Èlène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?*, 20 HUM. RESOURCE MGMT. REV. 295 (2010).

340. See Helen Turnbull et al., *Diversity and Inclusion in Organizations: Developing an Instrument for Identification of Skill Deficiencies*, 14 PROC. ACAD. ORG. CULTURE, COMM. & CONFLICT 28 (2009), available at <http://www.alliedacademies.org/public/Proceedings/Proceedings24/AOCCC%20Proceedings.pdf#page=32>.

341. See Lisa Hope Pelled et al., *Exploring the Black Box: An Analysis of Work Group Diversity, Conflict, and Performance*, 44 ADMIN. SCI. Q. 1 (1999).

342. See Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 219-20 (2009); Stanley F. Slater et al., *The Business Case for Commitment to Diversity*, 51 BUS. HORIZONS 201, 205-08 (2008).

343. See Eddy S.W. Ng, *Why Organizations Choose to Manage Diversity? Toward a Leadership-Based Theoretical Framework*, 7 HUM. RESOURCE DEV. REV. 58, 70-73 (2008), available at <http://hrd.sagepub.com/content/7/1/58.full.pdf+html>.

344. See Roberto Concepcion Jr., *Organizational Citizenship Through Talent Management: An Alternative Framework to Diversity in Private Practice*, 42 COLUM. J.L. & SOC. PROBS. 43 (2008).

345. See Marcia P. Shannon, *A Short Course in Succession Planning*, 37 LAW PRACTICE 32, 36 (May-June 2011).

346. See generally R. L. Kimbrough & P. J. Compton, *The Relationship Between Organizational Culture and Enterprise Risk Management*, ENGINEERING MGMT. J., June 2009, at 18.

347. See generally Liora Findler et al., *The Challenge of Workforce Management in a Global Society: Modeling the Relationship Between Diversity, Inclusion, Organizational Culture, and Employee Well-Being, Job Satisfaction and Organizational Commitment*, 31 ADMIN. SOC. WORK, no. 3, 2007 at 63.

348. See William D. Henderson, *Law Firm Strategies for Human Capital: Past, Present, Future*, in STUDIES IN LAW, *supra* note 76, at 73, 97-100.

recruitment and training. Early lawyer departure, induced by diversity-based disaffection and the lack of a critical mass of diverse partners or associates, imposes high replacement costs. Exclusion, even when only partial, increases the likelihood of early lawyer departure through attrition or lateral migration and heightens the recurrent cost of recruitment and training.

A sixth exclusion risk touches on litigation or settlement cost. Litigation cost may be registered internally, through lost business opportunity, or externally, through third party fee payment. Settlement cost may be measured by lost profit or capital contribution and investment. Exclusion increases the probability and accrued cost of defending against employment discrimination suits in hiring and promotion. By contrast, consider the risks and costs of inclusion.

3. INCLUSION RISKS

Inclusion risks similarly comprise key variables in Big Law workplace diversity. Structural risk management mechanisms and nonstructural deep governance norms both seek to mitigate or temper those variables in regulating the character, culture, and outcomes of law firm hiring, promotion, and retention. Six inclusion risks garner attention in modern law firms: labor pool dilution, social cohesion and branding depletion, client rejection and revenue diminution, operational inefficiency, accommodation price escalation, and litigation cost.

The first inclusion risk concerns labor pool expansion. Pool expansion may occur at entry-level and lateral points of access. Such access may be driven by pipeline and outreach programs. Inclusion of these sorts increases the cost of recruiting a more diverse labor force at both points of access and, at the same time, intensifies the fear of labor pool dilution.³⁴⁹

A second inclusion risk involves law firm social cohesion and branding depletion. Inclusion threatens firm collegiality and fraternity, and by extension, the stature of a firm within historically segregated or stratified bar, bench, and civic circles. Fueled by network or affinity groups, such inclusion may incite backlash, especially when the affected firm lacks an organizational commitment to diversity in both the character and culture of the institution.³⁵⁰

A third inclusion risk pertains to client rejection and revenue diminution. Inclusion tempts dissembling or prevaricating styles of client rebuff motivated by a distaste for or an objection to diversity initiatives in established and emerging markets.³⁵¹ Client rejection of an individual lawyer on diversity grounds, and the

349. See Stephen B. Knouse, *Targeted Recruiting for Diversity: Strategy, Impression Management, Realistic Expectations, and Diversity Climate*, 26 INT'L J. MGMT. 347 (2009).

350. Rhode, *Diversity and Gender Equity in Law Firms*, *supra* note 10, at 1053-56; see also Patrick F. McKay & Derek R. Avery, *Warning! Diversity Recruitment Could Backfire*, 14 J. MGMT. INQUIRY 330 (2005).

351. See Douglas A. Ready et al., *Winning the Race for Talent in Emerging Markets*, HARV. BUS. REV., Nov. 2008, at 62.

consequent dismissal of the affiliated law firm, results in a loss of revenue and market share.

A fourth inclusion risk relates to operational inefficiency. Inclusion demands alternative arrangements, such as race- or gender-based mentoring, monitoring, and information sharing systems, that may detract from institutional efficiency and productivity. Although such inclusive systems may advance internal fairness policies regarding compensation, performance appraisals, and work schedules, their planning and implementation entail logistical costs.

A fifth inclusion risk concerns accommodation price escalation. Inclusion requires accommodation policies, for example, parental leave and flexible or reduced-hour arrangements, which increase administrative and institutional oversight costs. These infrastructure costs³⁵² may rise due to intergroup competition³⁵³ and inequality.³⁵⁴

A sixth inclusion risk goes to litigation cost. Inclusion enlarges diversity and, therefore, increases the probability of employment discrimination suits by disgruntled entry-level and lateral hires, especially when targeted for harassment or victimized by retaliation.³⁵⁵ Weighed consciously and unconsciously,³⁵⁶ exclusion and inclusion risks contribute to the diversity and discrimination calculus of Big Law workplaces. Like discrimination itself, that calculus is often difficult to discern or to fault at least under standard conceptions of law firm workplace risk management.³⁵⁷

4. INTEGRITY AND DIVERSITY

To encourage diversity, equal opportunity, and workplace equity, lawyers and law firms must recognize and oppose the situational pressures, standard conventions, and institutionally scripted roles that foster discrimination and undermine integrity. These environmental constraints often overpower moral commitments and dissenting voices through the imposition of a stock cost-benefit

352. See generally Gayle White, *Diversity in Workplace Causes Rise in Unique Employee Benefits and Changes in Cafeteria Plans*, J. MGMT. & MARKETING RES., May 2009, <http://www.aabri.com/manuscripts/08082.pdf>.

353. See generally Taylor H. Cox et al., *Effects of Ethnic Group Cultural Differences on Cooperative and Competitive Behavior on a Group Task*, 34 ACAD. MGMT J. 827 (1991).

354. See generally Frank Linnehan & Alison M. Konrad, *Diluting Diversity: Implications for Intergroup Inequality in Organizations*, 8 J. MGMT. INQUIRY 399 (1999), available at <http://jmi.sagepub.com/content/8/4/399>.

355. See Jay M. Finkelstein, *Discrimination, Harassment, and Retaliation: The Dysfunctional Side of Diversity*, 59 CONSULTING PSYCHOL. J. PRAC. & RES. 254 (2007).

356. On conscious and unconscious bias in employment discrimination, see Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006). See also Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

357. See Jeffrey C. Connor, *It Wasn't About Race. Or Was It?*, HARV. BUS. REV., Sept.-Oct. 2000, at 37.

analysis in determining hiring, promotion, and retention. Opposition to this routine, makeshift analysis comes, as Luban explains, from an alternative set of right or reasonable principles that seek value-action harmony in applied contexts, for example, in connecting diversity norms to hiring practices of workplace inclusion. For Luban, this practical sense of harmony or equilibrium requires strategies of line-drawing, counter-intuitive reflection, and chronic skepticism in cognitive behavior and moral reasoning. In tension with Davis's paradigm of overriding private self-interest and law firm profitability, the strategies work to expose contrived ignorance and feigned deniability in the evaluation of workplace inclusion and exclusion risks.

Workplace assessment of inclusion and exclusion risks in law firms occurs at both structural and nonstructural levels of management. Structural risk assessment mechanisms include in-house recruitment and mentoring committees. Nonstructural risk assessment methods include equal opportunity measures that audit and monitor institutional value compliance. Both forms of regulation influence the character, culture, and outcomes of law firm hiring, promotion, and retention.

Reshaping law firm character and culture in the interests of diversity will not occur by denying the inequitable outcomes of profit-motivated, cost-benefit risk assessments of labor pool composition, social capital accumulation, client revenue, operational efficiency, human capital accommodation and attrition, or litigation and settlement cost. Unbounded by design and unchecked by evidence, such managerial assessments resist principled line-drawing and rely instead on reflexive intuitive judgments that reinforce historical practices of discrimination and exclusion in hiring, promotion, and retention. Consider labor pool composition. Traditionally, profit-oriented managerial risk assessment understates the benefits and overstates the costs of recruiting a more diverse entry-level and lateral labor force through pipeline and outreach programs.

Next consider social capital accumulation. Typically, profit-oriented managerial risk assessment overstates the benefits of firm collegiality and social cohesion, and understates the costs of social capital erosion in bar, bench, and civic communities due to failed institutional policies of gender diversity and racial integration.

Moreover, consider client revenue and market share. Conventionally, profit-oriented managerial risk assessment overstates the benefits of repugnant client revenue retention, and understates the costs in declining revenue and market share attributable to a failure to satisfy corporate diversity mandates or client integration demands.

Additionally, consider operational efficiency. Routinely, profit-oriented managerial risk assessment overstates the benefits of insular organizational leadership habits and citizenship rituals, and understates the costs of inadequate mentoring, monitoring, and information sharing systems and inequitable compensation, performance appraisal, and work schedule practices.

Furthermore, consider human capital accommodation and attrition. Customarily, profit-oriented managerial risk assessment overstates the benefits of attrition and lateral out-migration, even when disaffection-induced, and understates the costs of deficient accommodation policies (parental leave and flexible or reduced-hour arrangements), human capital investment in training, and lawyer replacement.

Finally, consider litigation and settlement costs. Generally, profit-oriented managerial risk assessment overstates the benefits of litigating or settling employment discrimination suits brought by discontented entry-level and lateral hires, and understates the costs of lost business opportunity and industry-wide reputational harm.

The consistently skewed analysis and inequitable result common to profit-motivated, cost-benefit risk assessments of workplace inclusion and exclusion practices among law firms suggest that such intuition-guided, cognitively biased formulas may be inappropriate or inhospitable to diversity determinations in hiring, promotion, and retention. Fundamentally, normative commitments to the values of diversity, equal opportunity, and workplace equity may be ill-suited to the shifting machinations and trade-offs of cost-benefit analysis. That is not to say, however, that line-drawing is impossible or unacceptable. Luban reminds us that line-drawing, along with counter-intuitive reflection and chronic skepticism, counts among the core principles of professional integrity.

However laudable, Davis's risk management paradigm lacks sufficient normative substance or procedural reliability to ensure lawyer or law firm compliance with Luban's integrity principles. To be fair, Davis's paradigm serves useful cognitive checking, compliance-enforcing, and loss prevention functions. Equally essential, his paradigm seeks to institutionalize a firm-wide culture of compliance adapted to the interests of the public, clients, and the spirit of the law. Yet, driven by the avowed large law firm goals of greater profitability and improved efficiency, those functions demonstrate a systematic preference for private values embodied in individual self-interest and institutional advantage displayed, for example, in *Kelley Drye*. Rooted in thin ethics rules rather than classical and diversity norms, that self- or institution-regarding private preference weakens the regulatory and equitable force of Davis's risk management prescriptions.

For risk management systems to succeed in curbing individual misconduct and compensation-fueled institutional pathology, containing adversarial excess, and diversifying the traditional law firm workplace requires more than risk-mitigating procedures and protocols. Indeed, they require a culture of compliance, a commitment to ethics rule conformity, and a willingness to abide by deep governance norms and to obey the spirit of the law. Davis concedes as much. He fails to admit, however, that neither culture, nor commitment, nor obedience will check the excesses of aggressive lawyering or overcome the traditions of workplace exclusion. The culture of the adversary system, the form and substance of ethical regulation, and the secular aspiration of the positive law

permit unchecked aggressive advocacy, possessive self-interest, and de facto exclusion. That aggressive style of advocacy and discriminatory self-aggrandizement, an advocacy without clear moral limits, denotes the legal realism of contemporary civil litigation and law firm governance.³⁵⁸

By contrast, classical and diversity norms advance the purposes of legality and justice, and enhance lawyer accountability for discretionary judgments about substantive merit and procedural form in advocacy and in law firm governance. Moreover, they reinforce regulatory norms of professionalism and ground compliance-enforcing procedures in a deeper culture of internal and external accountability. Davis's risk management paradigm integrates regulatory norms of compliance but minimizes discretionary norms of legality and justice, classical norms of moral aspiration as well as other-regarding interest in law and community, and diversity norms of equal opportunity and workplace equity. His paradigmatic commitment to private self-interest and law firm profitability encourages the dissonance and deniability of contrived ignorance, and the concomitant loss of lawyer personal and professional integrity. The very same commitments, coupled with the cultural and social artifacts of inequality and segregation, generate professional dissonance and deniability about workplace diversity and discrimination.

CONCLUSION

This Article seeks out the linkages connecting risk governance, litigation and transactional ethics, and diversity in the large firm legal services industry. In doing so, it mounts a qualified defense of risk management norms and practices while integrating the notions of risk deniability and integrity as well as the norms of classical, discretionary, regulatory, and diversity governance. No doubt fuller accounts of risk management, tournament competition, and competing classical, discretionary, regulatory, and diversity norms may better determine the influence of compliance systems and organizational culture on professional behavior in large law firms engaged in complex litigation, intricate transactions, and workplace recruitment. For the moment, it is enough to encourage broader normative critiques of risk management practices in lawyer regulation and law firm organization, and to urge wider empirical research in defense of risk management norms and practices within a more fully elaborated research agenda, an agenda that looks beyond the self-interest of individual lawyers and law firms to consider the other-regarding interests of clients, the public, and the law.

At the same time, it is useful to renew consideration of the professional norms of integrity undergoing amplification in the literature of philosophy and social

358. See Alfieri, *Jim Crow Ethics*, *supra* note 22, at 1670 (discussing adversary principles). See generally David Luban, *The Adversary System Excuse*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 22, at 19, 24–28; David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

psychology, especially the work of Luban. This expanding literature offers a moral response, grounded in law and community, to the rising dominance of lawyer malpractice, loss prevention, and professional liability norms and narratives. Those marketplace norms dilute our professional ambitions and traditions, deform ethical judgment, and inhibit moral integration. The challenge is not merely to resist the aggressive habits of law firm tournaments, specialized practice groups, and project teams, but to transform a moral universe that too often rewards the risk-taking and self-interested behavior of aggressive, non-inclusive lawyering itself.